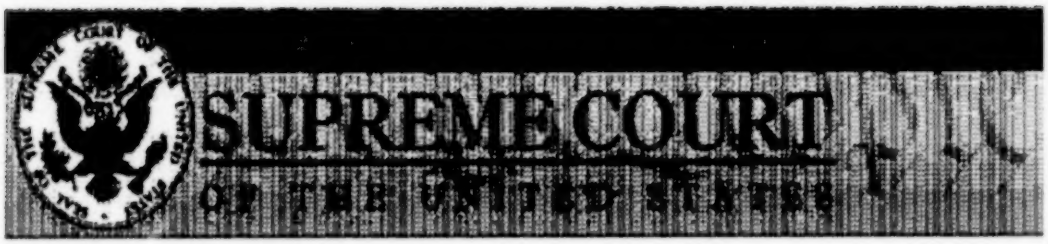

No. 13-946

Title:	Raul Lopez, Warden, Petitioner
	v.
	Marvin Vernis Smith
Docketed:	February 7, 2014
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(12-55860)
Decision Date:	September 23, 2013
Rehearing Denied:	November 8, 2013

~~Date~~	~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Feb 5 2014	Petition for a writ of certiorari filed. (Response due March 10, 2014)
Feb 27 2014	Waiver of right of respondent Marvin Vernis Smith to respond filed.
Mar 19 2014	DISTRIBUTED for Conference of April 4, 2014.
Mar 26 2014	Response Requested . (Due April 25, 2014)
Apr 14 2014	Order extending time to file response to petition to and including May 27, 2014.
May 27 2014	Brief of respondent Marvin Vernis Smith in opposition filed.
Jun 6 2014	Reply of petitioner Raul Lopez, Warden filed.
Jun 10 2014	DISTRIBUTED for Conference of June 26, 2014.
Jun 30 2014	DISTRIBUTED for Conference of June 30, 2014.
Jul 7 2014	Record Requested .
Jul 15 2014	Partial record received from the U.S.C.A. 9th Circuit (2 boxes). The remaining record is electronic.
Sep 22 2014	DISTRIBUTED for Conference of September 29, 2014.
Oct 6 2014	Petition GRANTED. Judgment REVERSED and case REMANDED. (Detached Opinion)
Nov 7 2014	JUDGMENT ISSUED.
Nov 18 2014	The record has been returned to U.S.C.A. 9th Circuit.

RECORD
AND
BRIEFS

No. 13-946

Supreme Court, U.S.
FILED
FEB 5 - 2014
OFFICE OF THE CLERK

In the Supreme Court of the United States

RAUL LOPEZ, WARDEN, *Petitioner,*

v.

MARVIN VERNIS SMITH, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit failed to apply the deferential standard of review required by 28 U.S.C. § 2254(d) when it granted federal habeas relief from a state murder conviction on the ground that the prosecutor's request for an aiding-and-abetting instruction at the jury-instruction conference violated a putative constitutional right to prior notice of the government's theory of prosecution—a right that has been recognized in the court of appeals' own precedents, but not established by any holding of this Court.

TABLE OF CONTENTS

Page

Petition for a Writ of Certiorari..... 1
Opinions and Judgment Below..... 1
Statement of Jurisdiction 1
Statutory Provision Involved..... 1
Statement 2
Reasons for Granting Certiorari..... 13
Conclusion 26

TABLE OF AUTHORITIES

Page

CASES

Berghuis v. *Smith*
559 U.S. 314 (2010) 25
Berghuis v. *Thompkins*
560 U.S. 370 (2010) 25
Bobby v. *Mitts*
131 S. Ct. 1762 (2011) 25
Brecht v. *Abrahamson*
507 U.S. 619 (1993) 10
Brown v. *Payton*
544 U.S. 133 (2005) 24
Burt v. *Titlow*
134 S. Ct. 10 (2013) 25
Carey v. *Musladin*
549 U.S. 70 (2009) 13, 17, 18, 24
Cavazos v. *Smith*
132 S. Ct. 2 (2011) 24
Cole v. *Arkansas*
333 U.S. 196 (1948) 8, 9, 15, 18
Coleman v. *Jackson*
132 S. Ct. 2060 (2012) 25
Cullen v. *Pinholster*
131 S. Ct. 1388 (2011) 24
Early v. *Packer*
537 U.S. 3 (2002) 24
Felkner v. *Jackson*
131 S. Ct. 1305 (2011) 24
Givens v. *Housewright*
786 F.2d 1378 (9th Cir. 1986) 8, 16

TABLE OF AUTHORITIES
(continued)

Page

Greene v. *Fischer*
132 S. Ct. 26 (2011) 25
Greene v. *Fisher*
132 S. Ct. 38 (2011) 25
Griffin v. *United States*
502 U.S. 46 (1991) 11, 12
Harrington v. *Richter*
131 S. Ct. 770 (2011) ..... passim
Hedgpeth v. *Pulido*
555 U.S. 57 (2008) 24
Holland v. *Jackson*
542 U.S. 649 (2004) 25
Howes v. *Fields*
132 S. Ct. 1181 (2012) 25
In re Oliver
333 U.S. 257 (1948) ..... passim
Johnson v. *Williams*
133 S. Ct. 1088 (2013) 24
Kane v. *Garcia-Espitia*
546 U.S. 9 (2005) 18, 24
Knowles v. *Mirzayance*
129 S. Ct. 1411 (2011) 18
Knowles v. *Mirzayance*
173 L. Ed. 2d 251 (2009) 17
Knowles v. *Mirzayance*
556 U.S. 111 (2009) 24
Lockyer v. *Andrade*
538 U.S. 63 (2003) 17, 19, 24
Marshall v. *Rodgers*
133 S. Ct. 1446 (2013) 13, 18, 24

TABLE OF AUTHORITIES
(continued)

Page

McDaniel v. *Brown*
558 U.S. 120 (2010) 24
Metrish v. *Lancaster*
133 S. Ct. 1781 (2013) 25
Mitchell v. *Esparza*
540 U.S. 12 (2003) 25
Morrison v. *Estelle*
981 F.2d 425 (9th Cir. 1992) 8, 16
Murtishaw v. *Woodford*
255 F.3d 926 (9th Cir. 2001) 8, 16
Nevada v. *Jackson*
133 S. Ct. 1990 (2013) 13, 17, 24
Parker v. *Matthews*
132 S. Ct. 2148 (2012) 13, 18, 25
People v. *Diaz*
3 Cal. 4th 495
834 P.2d 1171
11 Cal. Rptr. 2d 353 (1992) 2, 5, 7
People v. *Guiton*
4 Cal. 4th 1116
847 P.2d 45
17 Cal. Rptr. 2d 365 (1993) 5, 11, 12
Premo v. *Moore*
131 S. Ct. 733 (2011) 17, 24
Price v. *Vincent*
538 U.S. 634 (2003) 25
Renico v. *Lett*
559 U.S. 766 (2010) 8, 13, 18, 25
Rice v. *Collins*
546 U.S. 333 (2006) 22, 24

TABLE OF AUTHORITIES
(continued)

Page

Russell v. *United States*
369 U.S. 749 (1962) ..... passim
Schriro v. *Landrigan*
550 U.S. 465 (2007) 19, 24
Sheppard v. *Rees*
909 F.2d 1234 (9th Cir. 1990) ..... passim
Thaler v. *Haynes*
559 U.S. 43 (2010) 25
Thompson v. *Keohane*
516 U.S. 99 (1995) 21
Uttecht v. *Brown*
551 U.S. 1 (2007) 24
Waddington v. *Sarausad*
555 U.S. 179 (2009) 24
Wetzel v. *Lambert*
132 S. Ct. 1195 (2012) 25
Williams v. *Taylor*
529 U.S. 362 (2000) 17
Woodford v. *Visciotti*
537 U.S. 19 (2002) 24
Wright v. *Van Patten*
522 U.S. 120 (2008) 17, 18, 25
Yarborough v. *Alvarado*
541 U.S. 652 (2004) 17, 24
Yarborough v. *Gentry*
540 U.S. 1 (2003) 25

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

28 U.S.C.
§ 1254(1) 1
§ 2254 1
§ 2254(d) ..... passim
§ 2254(d)(1) ..... passim
§ 2254(d)(2) 11, 21, 22
§ 2254(e)(1) 22

Antiterrorism and Effective Death Penalty Act (AEDPA) ..... passim

California Penal Code
§ 971 ..... 2, 6, 8
§ 187(a) 2

CONSTITUTIONAL PROVISIONS

United States Constitution
Sixth Amendment 6

INDEX TO APPENDICES

Page

APPENDIX A
Opinion
United States Court of Appeals
Ninth Circuit
Case No. 12-55860
731 F.3d 859
Filed September 23, 2013.....1

APPENDIX B
Judgment
United States District Court
Central District of California
Smith v. *Lopez*
Case No. SA CV 11-1076 ODW (MRW)
Filed April 24, 2012.....28

APPENDIX C
Order Accepting Findings and Recommendations
United States Magistrate Judge
United States District Court
Central District of California
Smith v. *Lopez*
Case No. SA CV 11-1076 ODW (MRW)
Filed April 25, 2012.....29

APPENDIX D
Report and Recommendation
United States Magistrate Judge
United States District Court
Central District of California
Smith v. *Lopez*
Case No. SA CV 11-1076 ODW (MRW)
Filed February 28, 2012.....30

INDEX TO APPENDICES
(continued)

Page

APPENDIX E
Opinion
California Court of Appeal
Fourth Appellate District, Division Three
People v. *Marvin Vernis Smith*
Case No. G040107
Filed March 9, 2010.....61

APPENDIX F
Order Granting Petition for Review
California Supreme Court
People v. *Marvin Vernis Smith*
Case No. S181911
Filed June 23, 2010.....73

APPENDIX G
Opinion
California Court of Appeal
Fourth Appellate District, Division Three
People v. *Marvin Vernis Smith*
Case No. G040107
Filed December 8, 2010.....75

APPENDIX H
Mandate
United States Court of Appeals for the Ninth Circuit
Smith v. *Lopez*
Case No. Case No. 12-55860
Filed November 22, 2013.....105

INDEX TO APPENDICES
(continued)

Page

APPENDIX I
Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc
United States Court of Appeals
Ninth Circuit
Smith v. *Lopez*
Case No. Case No. 12-55860
Filed November 8, 2013.....106

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of California, on behalf of Warden Raul Lopez, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND JUDGMENT BELOW

The opinion of the court of appeals (Appendix A) is reported at 731 F.3d 859. The judgment of the district court (Appendix B) and the magistrate judge's report and recommendation (Appendix D) are unpublished. The California Court of Appeal's initial reversal of respondent's conviction (Appendix E), the California Supreme Court's order remanding the case for reconsideration (Appendix F), and the court of appeal's affirmance of the conviction on reconsideration (Appendix G) are also unpublished.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on September 23, 2013. Appendix A. A petition for rehearing and rehearing en banc was denied on November 8, 2013. Appendix I. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

1. a. In December 2005, respondent Smith summoned the police to his home, where Smith's elderly wife had been bludgeoned to death with a fireplace log turner. The police saw no signs of forced entry. Smith volunteered that there should be jewelry in a bedroom safe, but the police discovered the safe unlocked and empty. After further investigation, the police arrested Smith for the murder of his wife. In Smith's car they found both the "stolen" jewelry and duct tape matching a strip found near the body. Appendix G at 76-79.

The State filed an information charging that "[o]n or about December 15, 2005, in violation of Section 187(a) of the Penal Code (MURDER), a FELONY, MARVIN VERNIS SMITH did unlawfully and with malice aforethought kill MINNIE SMITH, a human being." CT 103. Under California law, that statement was sufficient to put at issue all potential theories of liability, including aiding and abetting. *See, e.g.*, Cal. Penal Code § 971; *People* v. *Diaz*, 3 Cal.

4th 495, 557, 834 P.2d 1171, 11 Cal. Rptr. 2d 353 (1992).

At a preliminary hearing, a detective testified that an informant had told police that, while jailed and awaiting trial, Smith had acknowledged that he wanted "to get rid of" his wife and that he left the house unlocked on the day of the murder after staging it to look like a robbery scene. As related by the detective, the informant said that Smith never told him who had committed the murder, how it had been committed, or whether it had been committed before Smith left the house. Appendix G at 86-87.

During opening statements in the trial, defense counsel informed the court that she had received word that the informant would refuse to testify. RT 331-33. The trial court ordered the parties not to refer to the informant's potential testimony during opening statements. RT 424.

In his opening statement, the prosecution told the jury that the State's evidence would show that Smith had bludgeoned his wife to death with the fireplace log turner. Appendix G at 80; RT 300. In its case in chief, the State produced the testimony of police officers describing what they had discovered, and what Smith had said to them, at the crime scene and in Smith's car. The prosecution also presented expert testimony that Smith's home had been staged to make it appear that his wife had been killed in a home-invasion robbery. There was also evidence that Smith had cavorted with other women, and that he had said his wife would have to "die" rather than take half of his property in a divorce. Appendix G at 77-79.

In its case, the defense presented testimony from neighbors, workers at a property owned by Smith, and staff at a medical center where Smith had an appointment, along with cellphone records and

receipts, to establish that Smith was elsewhere around town on the day of the murder. An orthopedic surgeon testified that Smith could not possibly have struck the fatal blows, because he had recently undergone shoulder surgery that made it physically impossible for him to have wielded the fireplace tool with sufficient force to kill his wife. The defense also presented a police interview of one of Smith's co-worker's, who suspiciously seemed to know unpublicized details about the crime—thus suggesting that he, rather than Smith, might have been the murderer. Appendix G at 79-80. The prosecutor did not call the informant whose statements had been related at the preliminary hearing, either in its case in chief or in rebuttal. Appendix G at 87.

During the jury-instruction conference, the prosecution requested a standard instruction that Smith might be guilty as an aider and abettor even if someone else had physically struck the fatal blow. Appendix G at 80. Smith objected, arguing that the prosecutor had not previously indicated that he would offer the jury an aiding-and-abetting theory, and that there was no evidence to support conviction on that basis. The court agreed to give the instruction, explaining that "considerable evidence" had been presented by both sides as to whether Smith had the physical ability to use the murder weapon, that there was likewise considerable evidence that Smith was involved in the murder, and that the instruction would guide the jurors if they believed that Smith had been involved in the crime even if he had not personally wielded the murder weapon. Appendix E at 66. Defense counsel did not ask to reopen the defense case to present evidence responsive to the aiding-and-abetting theory, or for a continuance to allow it to adjust its closing argument. Instead, the

instruction conference took place in the morning, and closing arguments began after a lunch recess. RT 2896-97, 2901.

During his opening summation, the prosecutor argued only that Smith was the murderer; he did not refer to an aiding-and-abetting theory at all. In her responsive argument, however, defense counsel predicted that the prosecutor would argue for the first time in rebuttal that a second person had been involved in the murder. She argued that the jury should reject any such theory because there was no evidence to support it. RT 3055. In rebuttal, the prosecutor again maintained that it was Smith himself who bludgeoned his wife to death. He noted, however, that if the jury disagreed with that position, it could still find Smith guilty if it found that that he had aided and abetted another perpetrator. RT 3111-12.

The jury convicted Smith of first degree murder, and the trial court sentenced him to 25 years to life in prison. Appendix G at 76.

b. The California Court of Appeal initially reversed. Appendix E. It held that the trial court had erred in giving an aiding-and-abetting instruction, because there was insufficient evidence to support conviction on that basis, and that the error required reversal. *Id.* at 66-72.

The California Supreme Court ordered the Court of Appeal to reconsider whether the instructional error was harmless in light of *People* v. *Guiton*, 4 Cal. 4th 1116, 847 P.2d 45, 17 Cal. Rptr. 2d 365 (1993). Appendix F. *Guiton* held that an error in instructing the jury on an alternate theory of guilt that is not supported by the evidence requires reversal only if the record affirmatively demonstrates a

reasonable probability that the jury relied solely on that theory in finding the defendant guilty.

c. On remand, the Court of Appeal affirmed Smith's conviction. It held that the trial court's error in giving an aiding-and-abetting instruction was harmless because the record did not affirmatively demonstrate the jury had relied on it. Indeed, the prosecutor had specifically argued in closing that the State's theory of the case was that Smith had committed the murder himself. Appendix G at 80-83.

The Court of Appeal then addressed Smith's further claim, previously unresolved, that he had been deprived of due process because the prosecution had requested an aiding-and-abetting instruction at the jury-instruction conference, without having indicated at any earlier point that it would advance such a theory. Smith argued that this "ambush" deprived him of a fair opportunity to prepare his defense. Appendix G at 85.

In rejecting this claim, the Court of Appeal recognized that "[b]oth the Sixth Amendment of the federal constitution and the due process guarantees of the state and federal constitutions require that a criminal defendant receive notice of the charges adequate to give a meaningful opportunity to defend against them." Appendix G at 86. It observed (*id.*), however, that state law specifically provides that all persons defined by state law as "principals" in the commission of a crime—which includes aiders and abettors—are to be "prosecuted, tried and punished as principals," and that "no other facts need be alleged in any accusatory pleading against any such person than are required in an accusatory pleading against a principal." Cal. Penal Code § 971; *see id.* § 31 (defining "principals"). State cases likewise make clear that an accusatory pleading charging a

defendant with murder need not specify any particular theory on which the prosecutor intends to rely. Appendix G at 86, citing *People* v. *Diaz*, 3 Cal. 4th 495, 557, 834 P.2d 1171, 11 Cal. Rptr. 2d 353 (1992). The Court of Appeal concluded that the information charging Smith with murder provided constitutionally adequate notice that he might have to defend against all available theories of the crime. It further noted that, if any additional notice were required, Smith received it at his preliminary hearing, because the potential testimony from an informant described at that hearing suggested that Smith might have used an accomplice to carry out the crime. Appendix G at 85-89.

The California Supreme Court denied Smith's petition for further review.

2. Smith then filed a federal petition for habeas corpus, raising the same claim that he had been deprived of due process because he received inadequate notice that the prosecution might seek to rely on an aiding-and-abetting theory.

a. The district court concluded that Smith was entitled to relief. Appendix D. The court acknowledged that the State's charging document gave Smith notice that he might have to defend against all theories of murder, including aiding and abetting. *Id.* at 48. It reasoned, however, that that initial notice had been "abrogated" by two subsequent events: the trial court's direction that the parties were not to discuss the informant's potential testimony in their opening statements at trial, and the prosecutor's ultimate decision not to call the informant as a witness. *Id.* at 51. The court observed that it was possible Smith might have tried his case differently had he been notified of the aiding-and-abetting theory earlier, and that in the court's

estimation the evidence was closely balanced, leaving the court with "real doubts about the validity of the jury's verdict here." *Id.* at 57-58.

b. The court of appeals affirmed. Appendix A.

(i) At the outset of its analysis, the court correctly stated the deferential standard of review established by 28 U.S.C. § 2254(d). Appendix A at 13. Under that standard, the federal courts would be authorized to grant habeas relief only if the state courts' rejection of Smith's claim "was contrary to, or an unreasonable application of, clearly established Federal law" as determined by this Court, or "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d).

Having articulated that standard, the court of appeals first cited three of this Court's cases for the general proposition that the Constitution guarantees a criminal defendant the right "to be informed of the nature and cause of the accusations against him so that he may have a meaningful opportunity to prepare an adequate defense[.]" Appendix A at 14, citing *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948); *In re Oliver*, 333 U.S. 257, 273 (1948); and *Russell* v. *United States*, 369 U.S. 749, 766-68 (1962). In the next sentence, it cited four of *its own* prior cases for a much more restrictive proposition: "Therefore, *we* have repeatedly recognized that a defendant who is charged with first-degree murder is entitled to notice of what *specific theory* of murder the prosecution intends to pursue." Appendix A at 14-15 (emphasis added), citing *Murtishaw* v. *Woodford*, 255 F.3d 926, 953-54 (9th Cir. 2001); *Morrison* v. *Estelle*, 981 F.2d 425, 428 (9th Cir. 1992); *Sheppard* v. *Rees*, 909 F.2d 1234, 1235 (9th Cir. 1990); and *Givens* v. *Housewright*, 786 F.2d 1378, 1380-81 (9th Cir. 1986).

The court then focused its discussion on *Sheppard* v. *Rees*, in which a prior panel had accepted a government concession of a due process violation where the prosecution had never mentioned a felony-murder theory, directly or indirectly, during any pretrial or trial proceedings, but then requested a felony-murder instruction after the instruction conference and immediately before closing arguments. Appendix A at 16. The court acknowledged that *Sheppard* was a "'narrow ruling,'" issued before federal habeas review was substantially narrowed by the Antiterrorism and Effective Death Penalty Act (AEDPA), and that even the Ninth Circuit itself had previously "distinguished it where the facts of a case varied even slightly." *Id.* at 17. In the court's view, however, *Sheppard*'s specific holding had "faithfully applied the principles enunciated by [this] Court in *Cole*, *Oliver*, and *Russell*." *Id.* And Smith's case, the court concluded, was "indistinguishable from *Sheppard*." *Id.*

In reaching that conclusion, the court acknowledged that the charging document in this case "was initially sufficient to put [Smith] on notice that he could be convicted either as a principal or as an aider-and-abettor." Appendix A at 17. As the court viewed the record, however, "the prosecution's conduct throughout the pretrial and trial proceedings affirmatively led Smith to reasonably believe that it would not rely on an aiding-and-abetting liability theory." *Id.* at 18. Indeed, "as the California Court of Appeal recognized, the prosecution presented *no evidence* at trial to support an aiding-and-abetting theory." *Id.* at 19 (emphasis in original). The court rejected the argument that the defense's own evidence, focused on suggesting the possibility of a different perpetrator, itself suggested the possibility of

an aiding-or-abetting theory (*id.* at 20); and it termed "puzzling" the state Court of Appeal's similar observation about the potential informant testimony explored at the preliminary hearing (*id.* at 21). Instead, the court reasoned, the prosecution tried its case on a direct-perpetration theory; presented "no evidence" in support of an aiding-and-abetting theory; and then "'ambushed'" Smith by seeking an aiding-and-abetting instruction. *Id.* at 21-22. That course of conduct deprived Smith of his "fundamental right to notice of the nature of the accusations against him ... in violation of *Cole*, *Oliver*, and *Russell*." *Id.* at 22.

(ii) Having concluded that the course of the trial in this case had deprived Smith of fair notice under *Sheppard*, the court of appeals briefly considered the question of harmless error. Appendix A at 22-23. The court's two-paragraph analysis focused, however, not on any specific harm that might have been caused by late notice of the availability of aiding-and-abetting as a secondary theory of liability, but on whether the giving of the aiding-and-abetting instruction itself had a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 22 (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993)). With no analysis of what, if anything, defense counsel might have done differently if provided with more notice of a possible aiding-and-abetting theory, the court expressed its view that the evidence in the case was "evenly balanced," and thus that "the fact that the prosecutor invited the jury to speculate—at the last minute and without any evidence—about Smith's liability as an aider and abettor" was enough to lead to "grave doubts about the validity of the jury's verdict." *Id.* at 23.

(iii) In the last section of its opinion, the court considered "whether § 2254(d) bars habeas relief." Appendix A at 23. In that regard, the court reasoned that there is no AEDPA bar where a state court's decision is "'based on an unreasonable determination of the facts' in light of the record before the state court." 28 U.S.C. § 2254(d)(2). Here, the court held, the California Court of Appeal based its rejection of Smith's claim on two "unreasonable" factual findings: (i) that the informant's preliminary hearing testimony "'meaningfully apprised [Smith] of the potential for an aiding and abetting theory,'" and (ii) that, on the facts here, the request for an aiding-and-abetting instruction came during the general jury instruction conference and "'not just prior to closing argument'" as in *Sheppard*. Appendix A at 23-24 (emphasis omitted). This two-paragraph analysis under Section 2254(d)(2) apparently provides the court's primary justification for its ruling.

As the court acknowledged (Appendix A at 24), the State also argued that any grant of relief would violate Section 2254(d)(1). The California Court of Appeal concluded that any error related to the giving of an aiding-and-abetting instruction was harmless in light of this Court's decision in *Griffin* v. *United States*, 502 U.S. 46 (1991), and the California Supreme Court's parallel holding in *People* v. *Guiton*, 4 Cal. 4th 1116 (1993). Appendix A at 24-26. Those cases hold that where an alternative theory of liability is submitted to the jury without adequate factual support, an ensuing conviction should nonetheless be sustained unless review of the record establishes a reasonable probability that the jury actually relied solely on the unsupported theory. *See id.* at 24. Here, the state Court of Appeal reviewed the record and held there was no indication that the jury relied on

any aiding-and-abetting theory. The State argued that there was no basis for a federal court to conclude under Section 2254(d)(1) that that conclusion was "contrary to" or "an unreasonable application of" federal law clearly established by this Court. On the contrary, under the reasoning of *Griffin* and *Guiton*, there could be no harm to Smith from any error related to aiding and abetting—including any putative notice error—if, as Smith had successfully argued (and the Ninth Circuit itself repeatedly stated), the record was devoid of any evidence to support any such theory in the first place.

The Ninth Circuit rejected that contention. Appendix A at 24-26. Although its own harmless-error analysis a few paragraphs earlier focused entirely on the strength of the proof against Smith and the chance that the jury might have been misled by an instruction and alternative argument on aiding-and-abetting, here the court accused the State of "conflat[ing] two fundamentally different inquiries"—possible harm from the notice error and possible effect of the aiding-and-abetting theory on the jury's verdict. *Compare* Appendix A at 22-23 *with id.* at 24-25. The notice issue, the court reasoned, was "separate [from] and unrelated to the question of whether a factually unsupported jury instruction, by itself, requires reversal." *Id.* at 26. And because the issue addressed by the state Court of Appeal was different from the question of notice, the federal court was "not constrained by § 2254(d)(1) in deciding that the trial court's error in this case was not harmless." *Id.* at 26.

c. The court of appeals denied rehearing and rehearing en banc. Appendix I.[1]

---

[1] The district court has granted the State's request for a (continued...)

REASONS FOR GRANTING CERTIORARI

The Ninth Circuit set aside Smith's state murder conviction without any demonstration that the state courts' treatment of his notice claim was contrary to a rule of federal law clearly established by decisions of this Court—let alone that it was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 131 S. Ct. 770, 786-87 (2011); 28 U.S.C. § 2254(d). In identifying purported constitutional error in Smith's trial, the court of appeals cited this Court's precedents only for general principles of fair notice, while looking onto its own prior cases in deciding how those principles should be applied in the context of particular cases. That approach is indistinguishable from *de novo* review on direct appeal, and wholly inconsistent with the limited scope of federal habeas review under 28 U.S.C. § 2254(d) after AEDPA. It is fundamental error of a sort that this Court has repeatedly and forcefully condemned. *See, e.g.*, *Nevada* v. *Jackson*, 133 S. Ct. 1990 (2013) (*per curiam*); *Marshall* v. *Rodgers*, 133 S. Ct. 1446 (2013) (*per curiam*); *Carey* v. *Musladin*, 549 U.S. 70 (2009); *Parker* v. *Matthews*, 132 S. Ct. 2148 (2012) (*per curiam*); *Renico* v. *Lett*, 559 U.S. 766 (2010).

The Ninth Circuit's published opinion in this case will subject state criminal convictions throughout its jurisdiction to collateral attack based on that

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(...continued)
stay of its mandate (directing retrial) pending the conclusion of proceedings in this Court.

court's views of what constitutes fair notice of the government's specific theories of prosecution, and of how even initially adequate notice may be vitiated based on inferences from government actions or silence on particular issues between the filing of a charge and the formulation of jury instructions. That result is not required by any decision of this Court, and thus cannot be reconciled with AEDPA. More generally, this is another in a line of cases in which States have had to ask this Court to instruct the courts of appeals concerning the proper limits of federal habeas review after AEDPA. As in many other such instances, the failure to observe those limits here is clear on the face of the record, and the Court may wish to consider summary reversal.

1. The California Court of Appeal fairly adjudicated and rejected Smith's notice claim. In doing so, it clearly identified the principles of fair notice clearly established by the federal Constitution and decisions of this Court. *See* Appendix G at 86. It explained that, under California law, a criminal information charging Smith with murder was adequate to put him on notice that he might need to defend against an aiding-and-abetting theory of liability—a point conceded by the Ninth Circuit. *Id.*; *see* Appendix A at 17. The state court also explained why, in its judgment, Smith remained on notice of that possibility throughout the proceedings against him. Appendix G at 86-89.

Section 2254(d) and this Court's cases set narrow bounds for federal collateral review of such a state court adjudication. As this Court has explained, a federal court must first determine what arguments or theories support the state court's decision. The question then is only whether the state decision is contrary to, or an unreasonable application of, federal

law as clearly established by this Court. That is, the only question the federal court may ask is "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holdings in a prior decision of this Court." *Harrington* v. *Richter*, 131 S. Ct. at 786.

That is not how the Ninth Circuit proceeded in this case. To be sure, at the outset of its discussion the court pointed to general principles of fair notice that have been articulated in decisions of this Court. Appendix A at 14. This Court has said—and the State does not dispute—that "notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1968); accord *Russell* v. *United States*, 369 U.S. 749, 766-68 (1962) ("[n]otice must be sufficiently detailed to enable a defendant to address all the relevant issues in his defense"); *In re Oliver*, 333 U.S. 257, 273 (1948). Neither those general principles, however, nor the particular facts and holdings of this Court's cases, come close to dictating the result in this case.

In *Cole*, for example, the defendants were charged by information with violating § 2 of an Arkansas statute. *Cole*, 333 U.S. at 197-98. On appeal, however, the state Supreme Court upheld the convictions under § 1—a "separate, distinct, and substantially different offense." *Id.* at 200-01. This Court held that the convictions could not be sustained on the basis of an offense for which the defendants had never been tried. In *Russell*, the Court reasoned that defendants could not be prosecuted under 2 U.S.C. § 192 for refusing to answer questions before a congressional committee where the indictment did not

identify the subject under investigation. 369 U.S. at 767-68. In *Oliver*, a judge charged the defendant with criminal contempt, and immediately found him guilty, based on alleged perjury during secret grand jury proceedings. 333 U.S. at 257. This Court held that that course of proceedings violated the defendant's basic rights to notice of the charges against him, to have a reasonable opportunity to prepare a defense, to have counsel, to testify, and to call witnesses. *Id.* at 275.

None of these situations bears any resemblance to the facts of this case. Nor, indeed, did the court of appeals discuss the factual settings of the cases it cited from this Court, or attempt to explain why their actual holdings controlled the result in this case. It relied instead on the facts and holdings of *its own* prior cases applying general notice principles to specific situations. Those cases, the court explained, had "repeatedly recognized that a defendant who is charged with first-degree murder is entitled to notice of what specific theory of murder the prosecution intends to pursue." Appendix A at 14-15 (citing *Sheppard* v. *Rees*, 909 F.2d 1234, 1235 (9th Cir. 1990); *Murtishaw* v. *Woodford*, 255 F.3d 926, 953-54 (9th Cir. 2001); *Morrison* v. *Estelle*, 981 F.2d 425, 428 (9th Cir. 1992); and *Givens* v. *Housewright*, 786 F.2d 1378, 1380-81 (9th Cir. (1986)). Moreover, the court here further narrowed that rule to hold that even after proper notice has been given in a charging document, it can be negated based on inferences from the prosecution's later conduct during pretrial or trial proceedings. Appendix A at 16-22. That is the rule the court ultimately relied on as a basis for granting a federal writ in this case.

Neither of these propositions follows necessarily from any holding of this Court. Accordingly, the Ninth Circuit's reliance on them to reverse a state court judgment was improper as a matter of AEDPA habeas review. Just last year, reversing the Ninth Circuit in *Nevada* v. *Jackson*, 133 S. Ct. at 1993-94, this Court admonished again that Section 2254(d) requires federal habeas courts to identify and apply only controlling constitutional "holdings" of this Court. "[C]learly established Federal law, as determined by the Supreme Court" refers to "the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Lockyer* v. *Andrade*, 538 U.S. 63, 71 (2003); *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000). Lower courts may not point to general statements in this Court's cases and infer or extrapolate a basis for setting aside a state court judgment. Before a federal writ may be granted, this Court itself must have "squarely" established the specific rule at issue. *Harrington* v. *Richter*, 131 S. Ct. at 786; *Knowles* v. *Mirzayance*, 173 L. Ed. 2d 251 (2009); *Carey* v. *Musladin*, 549 U.S. at 75-76; *Wright* v. *Van Patten*, 522 U.S. 120, 126 (2008) (*per curiam*). Indeed, this Court must have applied the rule in the same "context" as that in which the habeas petitioner's claim arises. *Premo* v. *Moore*, 131 S. Ct. 733, 743 (2011); *Carey* v. *Musladin*, 549 U.S. at 75-76; *see Yarborough* v. *Alvarado*, 541 U.S. 652, 660-61, 663-64 (2004).

By the same reasoning, when undertaking collateral review of state court judgments, a federal court may not treat its own precedents as substitutes for, or supplements to, this Court's holdings. Circuit precedent is not "clearly established Federal law" for purposes of Section 2254(d)(1). *See Nevada* v.

Jackson, 133 S. Ct. at 1994; *Marshall* v. *Rodgers*, 133 S. Ct. at 1450-51; *Parker* v. *Matthews*, 132 S. Ct. at 2155; *Carey* v. *Musladin*, 549 U.S. at 77; *Knowles* v. *Mirzayance*, 129 S. Ct. 1411, 1419 (2011); *Renico* v. *Lett*, 130 S. Ct. at 1865-66; *Kane* v. *Garcia-Espitia*, 546 U.S. 9, 10 (2005) (*per curiam*); *accord*, *Wright* v. *Van Patten*, 552 U.S. at 125-126. In *Parker* v. *Matthews*, for example, this Court bluntly observed that it was "plain and repetitive error for the Sixth Circuit to rely on its own precedents in granting Matthews habeas relief." 132 S. Ct. at 2155-56.

Yet, that is exactly what the Ninth Circuit did here. Tellingly, the panel cited, as the fundamental if not sole basis for its holding, its conclusion that "[t]his case is indistinguishable from *Sheppard*"—a Ninth Circuit decision. Appendix A at 17. Whether or not this case is distinguishable from circuit precedent is not the question on habeas review. What the court's statement puts into sharp relief is that its method of analyzing this case was indistinguishable from what it would have done on direct or *de novo* review. As in *Richter*, "it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA." 131 S. Ct. at 786.

The Ninth Circuit agreed with the California Court of Appeal that the general murder charge lodged against Smith gave him constitutionally adequate notice of a possible aiding-and-abetting theory of liability. No decision of this Court clearly establishes the proposition that such notice, once properly given, could be negated later based on inferences from the conduct of the prosecution before or during trial. Certainly *Cole*, *Russell*, and *Oliver* do not establish any such rule, either in general or in the specific context presented by the facts of this case. Moreover, under AEDPA, the "only question that

matters" is "not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro* v. *Landrigan*, 550 U.S. 465, 473 (2007); *Lockyer* v. *Andrade*, 538 U.S. at 71. Yet, the court below never considered whether, even under such a rule, reasonable jurists on the California Court of Appeal could have concluded, as they did, that Smith was *not* denied fair notice on the facts of this case. *See Harrington* v. *Richter*, 131 S. Ct. at 786. In fact, all the court of appeals here really decided was that, applying its own precedents to the facts in Smith's case, it would have reached a different result. That approach to federal habeas review was manifestly improper under AEDPA.

2. The court of appeals also erred in concluding (Appendix at 22-23) that any notice error was prejudicial. In one cursory paragraph, the court cited comments by the state court for the proposition that the evidence against Smith was "evenly balanced," and abruptly concluded that it had "grave doubts" about the jury's verdict in light of the "the fact that the prosecutor invited the jury to speculate—at the last minute and without any evidence—about Smith's liability as an aider and abettor." *Id.* at 23. The court did not explain, however, what any of this had to do with the potential effect of an alleged error in providing Smith with *notice* of an aiding-and-abetting theory—as opposed to the effect of the error identified by the state courts in instructing the jury on aiding and abetting and allowing the prosecutor to argue that theory at all. Nor did it explain what it thought defense counsel would or could have done differently if she had received earlier *notice* of the aiding-and-abetting theory. And that is not surprising, because defense counsel also never explained, either to the

state courts or in Smith's briefs to the Ninth Circuit, what the defense would have done differently if it had received more notice. Indeed, at the time the issue first arose, counsel objected to the giving of an aiding-and-abetting instruction, but did not request a continuance to revise her closing argument when that objection was overruled, or move to reopen Smith's case to present any additional evidence, or lodge any new objection to the State's evidence in light of the potential alternative ground for conviction. Instead, she did the most effective (and perhaps only) thing that she could have done to combat an aiding-and-abetting theory, no matter how much notice was involved: She argued to the jury that there was no evidence to support it.

That is particularly important because Smith also made that argument on his direct appeal in state court, where he *prevailed as a matter of law*. The state courts agreed with Smith that there was no evidence to support an aiding-and-abetting theory, and that the court should not have instructed on it. They held that error to be harmless, based on cases from this Court and the California Supreme Court holding that, where an alternative theory is argued to the jury but there is insufficient evidence to support it, the jury is presumed to have relied on another ground to convict unless there is some affirmative indication to the contrary in the record. *See* Appendix G at 81-83. For present purposes, the main point is that, although the State has always maintained there was enough evidence to permit instructing the jury on an aiding-and-abetting theory, the state and federal courts have all agreed with Smith that the theory was submitted to the jury "without any evidence" to support it. *E.g.*, Appendix A at 23. If that is true, then there is no ground for

concluding that the jury relied on a wholly unsupported theory, or that anything about that theory—the decision to instruct on it, or the amount of time that defense counsel had to prepare to meet it—made any difference to the outcome of Smith's trial. And surely there was no ground for the Ninth Circuit to grant federal habeas relief in the face of the state Court of Appeal's express conclusion that the record provided no basis for concluding that the jury actually relied on the aiding-and-abetting theory in any respect.

3. The court of appeals sought to justify its result under AEDPA on the ground that the state Court of Appeal's judgment rested on two "unreasonable determination[s] of the facts" (28 U.S.C. § 2254(d)(2)): (1) that preliminary hearing testimony concerning a possible informant witness had meaningfully apprised Smith of the possibility of an aiding-and-abetting theory and (2) that the prosecutor's request for an aiding-and-abetting instruction came in advance of closing arguments, so that defense counsel had adequate time to prepare a response. Appendix A at 23-24. That reasoning is unsustainable.

First, these determinations were hardly findings of historic fact of the sort that Congress had in mind in framing Section 2254(d)(2). They are more legal or mixed questions concerning whether undisputed historical facts support legal conclusions of fair notice or unfair surprise. *See generally Thompson* v. *Keohane*, 516 U.S. 99, 110-11 (1995). If the court of appeals wished to question such conclusions, it was required to do so under the stringent standards applicable to the review of state courts' legal conclusions under Section 2254(d)(1).

Second, the two "findings" cited by the court of appeals would be material only if one accepted the court's legal premises (i) that there is a "clearly established" federal rule that proper notice in a charging document may be superseded by inferences from the prosecutor's later conduct and (ii) that an error involving late notice of an alternative theory of liability could be harmful even where the courts and the defendant all agree that there was never any evidence to support that theory. Those premises are unsound for the reasons set out above.

Finally, even if the two propositions identified by the court of appeals were material factual findings by the state Court of Appeal, under AEDPA the federal courts were required to accept them as true unless Smith showed them to be false by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Smith made no such showing, and the court of appeals did not fairly analyze the "findings" for objective reasonableness under Section 2254(d)(2). Again, it merely substituted its own view of the facts, and their legal import, for the reasonable conclusions of the state court. See *Rice* v. *Collins*, 546 U.S. 333, 341-42 (2006).

4. This case should have resulted in a straightforward analysis and the denial of Smith's federal habeas petition. In rejecting Smith's notice claim, the state court correctly identified the controlling principles of federal law clearly established by this Court and reasonably applied them to the facts of the case. It properly held that the charging document provided Smith with notice that he could be required to defend against all theories of liability for murder, including aiding-and-abetting. It reasonably concluded that, if any further notice were required, Smith received it through the preliminary hearing. It

reasonably concluded that the prosecution did not unfairly "ambush" Smith by asking for an aiding-and-abetting instruction at the instruction conference—a conclusion bolstered by the fact that Smith's counsel did not request a continuance in light of the trial court's decision to give the instruction, and never articulated to the state courts any way in which his defense was actually adversely affected by the claimed lack of notice. And on the underlying issue of alleged error in giving the aiding-and-abetting instruction, the state court agreed with Smith that there was no evidence to support an aiding-and-abetting theory, and on that basis correctly concluded that giving the instruction was not reversible error. All these determinations were, at a minimum, reasonable applications of the law. In such circumstances, Section 2254(d) precludes federal courts from setting aside state convictions.

The Ninth Circuit's published decision in this case threatens to interfere with longstanding practices under state law. California (like many States) has never required an accusatory pleading to specify any particular theory of culpability. Nor has it required prosecutors to restate possible theories at unspecified intervals during the course of the prosecution, in order to avoid any implication that they have disclaimed a potential theory through a course of conduct or the presentation of evidence that would support other conclusions. Although the court of appeals accepted the permissibility of general pleading, its decision in this case will make prosecutions in California and elsewhere vulnerable, on direct appeal and on federal habeas review, to readily-framed claims that notice that was initially proper under a general charging document was later implicitly abrogated by some conduct by prosecutors,

judges, witnesses, or even defense counsel during the course of the proceedings.

More generally, however, the case warrants intervention by this Court because it is another instance in which the court of appeals has plainly failed to abide by the restrictions that Congress has placed on federal habeas review of state convictions—and by this Court's repeated opinions interpreting and enforcing those restrictions. Last Term, this Court reversed three Ninth Circuit judgments (two of them summarily) based on similar misapplications of AEDPA's highly deferential standard of review.[2] The 2010 Term saw four such reversals.[3] In the last decade, the Court has reversed twenty-three Ninth Circuit judgments on similar grounds, nine of them in *per curiam* opinions.[4] In the same period, the Court

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[2] *Johnson* v. *Williams*, 133 S. Ct. 1088 (2013); *Marshall* v. *Rodgers* 133 S. Ct. 1446 (2013) (*per curiam*); *Nevada* v. *Jackson*, 133 S. Ct. 1990 (2013) (*per curiam*).

[3] *Premo* v. *Moore*, 131 S. Ct. 733 (2011); *Harrington* v. *Richter*, 131 S. Ct. 770 (2011); *Felkner* v. *Jackson*, 131 S. Ct. 1305 (2011) (*per curiam*); *Cullen* v. *Pinholster*, 131 S. Ct. 1388 (2011).

[4] In addition to the cases cited in footnotes two and three, *see Cavazos* v. *Smith*, 132 S. Ct. 2 (2011) (*per curiam*); *McDaniel* v. *Brown*, 558 U.S. 120 (2010) (*per curiam*); *Waddington* v. *Sarausad*, 555 U.S. 179 (2009); *Hedgpeth* v. *Pulido*, 555 U.S. 57 (2008); *Uttecht* v. *Brown*, 551 U.S. 1 (2007); *Schriro* v. *Landrigan*, 550 U.S. 465 (2007); *Knowles* v. *Mirzayance*, 556 U.S. 111 (2009); *Carey* v. *Musladin*, 549 U.S. 70 (2006); *Rice* v. *Collins*, 546 U.S. 333 (2006); *Kane* v. *Garcia Espitia*, 546 U.S. 9 (2005) (*per curiam*); *Brown* v. *Payton*, 544 U.S. 133 (2005); *Yarborough* v. *Alvarado*, 541 U.S. 652 (2004); *Yarborough* v. *Gentry*, 540 U.S. 1 (2003) (*per curiam*); *Lockyer* v. *Andrade*, 538 U.S. 63 (2003); *Early* v. *Packer*, 537 U.S. 3 (2002) (*per curiam*); *Woodford* v. *Visciotti*, 537 U.S. 19 (2002) (*per*

(continued...)

has reversed more than twenty decisions of other Circuits, many again summarily, for the same kinds of failures.[5] Against this backdrop, the State respectfully suggests that in this case the court of appeals' failure to engage in properly restrained AEDPA review is once again clear, and once again merits either review or summary reversal by this Court.

(...continued)
curiam).

[5] See, e.g., *Burt* v. *Titlow*, 134 S. Ct. 10 (2013) (Sixth Circuit); *Metrish* v. *Lancaster*, 133 S. Ct. 1781 (2013) (Sixth Circuit); *Parker* v. *Matthews*, 132 S. Ct. 2148 (2012) (per curiam) (Sixth Circuit); *Howes* v. *Fields*, 132 S. Ct. 1181 (2012) (Sixth Circuit); *Wetzel v. Lambert*, 132 S. Ct. 1195 (2012) (*per curiam*) (Third Circuit); *Coleman* v. *Jackson*, 132 S. Ct. 2060 (2012) (*per curiam*) (Third Circuit); *Greene* v. *Fisher*, 132 S. Ct. 38 (2011) (Third Circuit); 132 S. Ct. 26 (2011) (Sixth Circuit) (*per curiam*); *Bobby* v. *Mitts*, 131 S. Ct. 1762 (2011) (Sixth Circuit) (*per curiam*); *Renico* v. *Lett* 559 U.S. 766 (2010) (Sixth Circuit); *Berghuis* v. *Thompkins*, 560 U.S. 370 (2010) (Sixth Circuit); *Berghuis* v. *Smith*, 559 U.S. 314 (2010) (Sixth Circuit); *Thaler* v. *Haynes*, 559 U.S. 43 (2010) (*per curiam*) (Fifth Circuit); *Wright* v. *Van Patten*, 552 U.S. 120 (2008) (*per curiam*) (Seventh Circuit); *Holland* v. *Jackson*, 542 U.S. 649 (2004) (*per curiam*) (Sixth Circuit); *Price* v. *Vincent*, 538 U.S. 634 (2003) (Sixth Circuit); *Mitchell* v. *Esparza*, 540 U.S. 12 (2003) (*per curiam*) (Sixth Circuit).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 5, 2014

RU:mtl

FILED September 23, 2012

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARVIN VERNIS SMITH,
Petitioner-Appellee,
v.
RAUL LOPEZ, Warden,
Respondent-Appellant.

No. 12-55860

D.C. No.
8:11-cv-01076-ODW-MRW

OPINION

Appeal from the United States District Court
for the Central District of California
Otis D. Wright II, District Judge, Presiding

Argued and Submitted
March 6, 2013—Pasadena, California

Filed September 23, 2013

Before: Sidney R. Thomas and Andrew D. Hurwitz, Circuit
Judges, and Ralph R. Beistline, Chief District Judge.
FN*

Opinion by Judge Thomas

FN* The Honorable Ralph R. Beistline, Chief District Judge for the U.S.
District Court for the District of Alaska, sitting by designation.

SUMMARY. FN**

Habeas Corpus

The panel affirmed the district court's conditional grant of a 28 U.S.C. § 2254 habeas corpus petition claiming that petitioner was denied his right to notice of the nature of the accusations against him when the trial judge gave an aidingand- abetting jury instruction.

The panel explained that, although the criminal information charging petitioner with first-degree murder was initially sufficient to put him on notice that he could beconvicted either as a principal or as an aider-and-abettor, theprosecution's conduct throughout the pretrial and trial proceedings affirmatively led petitioner to believe that the prosecution would not rely on an aiding-and-abetting liability theory. The panel held that the aiding-and-abetting jury instruction, given only after the prosecution requested it at the jury instructions conference, violated petitioner's right to notice of the nature of the charges against him, as well as the right to prepare a defense. The panel held that the error was not harmless.

FN** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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OPINION

THOMAS, Circuit Judge:

In this appeal, we consider whether a habeas petitioner's constitutional right to notice of the nature of the accusations against him was violated. We agree with the district court that it was, and we affirm the judgment granting federal habeas relief.

I

A

On the evening of December 15, 2005, police officers went to the home of Marvin and Minnie Smith in response to Marvin Smith's 911 call reporting a burglary in progress. In the upstairs bedroom, the police found Minnie Smith's body on the floor. She had been killed by a crushing blow to her head from a fireplace log roller, and her body had other injuries that may have been inflicted before her death. Her hands were bound by a wire clothes hanger, and her feet had been bound by a strip of duct tape that was found near the body. Parts of the house appeared to have been ransacked, and valuable jewelry was missing from the bedroom.

Several weeks later, Smith was arrested for the murder of his wife. A felony complaint charged Smith with "unlawfully and with malice aforethought kill[ing] MINNIE SMITH" in violation of California Penal Code § 187(a).

At the preliminary examination hearing, the prosecution presented the testimony of Detective Christopher McShane. Detective McShane testified that he had interviewed David Moraga, Smith's cell mate for six months, and that Moraga had told Detective McShane that Smith made incriminating statements while they were celled together:

> Q. And did [Moraga] indicate to you whetherMarvin Smith had told him anything about the killing of Minnie Smith?
>
> A. Yes.
>
> Q. What did [Moraga] say to you he'd heard from Marvin Smith?
>
> A. He said that Marvin had told him that he had to get rid of his wife because she was standing in the way of his future plans; that she was threatening to divorce him and he wasn't going to give up half of his property he worked so hard for his entire life. Said on the day of the murder he had left the house earlier than he normally does, that he left, he took the jewelry and the money out of the safe with him. He staged it to look like a home invasion robbery. He left a window open. He exited the house without setting the alarm. He went through the front door of the house, and that he went to work that day.

On cross-examination, Detective McShane admitted that Moraga was vague on the details of the murder:

> Q. Did Mr. Moraga, Detective, tell you the manner in which the killing was carried out?
>
> A. He said that she was beat up real bad.
>
> Q. Did he give any further details?
>
> A. No.
>
> [. . .]
>
> Q. And [Moraga] didn't really have any information about who specifically did the homicide, did he?
>
> A. Marvin never told him specifically who did

it, no. . . .

[. . .]

Q. [Moraga] didn't know any of the details of the homicide itself and how it was carried out, correct?

A. Correct.

Q. Did he tell you that the homicide was committed before Mr. Smith left the house or was he vague on that point?

A. He was vague.

The court found probable cause to try Smith on the charge in the felony complaint, and the district attorney then filed an information reciting the same charge of first-degree murder.

At Smith's trial, the prosecutor said in his opening statement that "the evidence will show that that man over there at the end of counsel table, wearing the nice sweater, murdered his wife of 27 or 28 years, and then he staged the crime scene to make it look like a burglary and to avoid detection." Later, the prosecutor said that "the evidence will show" that "the defendant bludgeoned [Minnie Smith] to death, bound her arms behind her with a wire coat hanger, and then staged the scene to look like a burglary." The prosecution asserted that Smith killed his wife because he did not want to divide his substantial assets with her in the event of a divorce.

In the middle of the prosecution's opening statement, defense counsel learned that Moraga had refused to testify. During a recess, Moraga's attorney told the court that his client would invoke his Fifth Amendment privilege if called to the stand. The judge concluded that it was unlikely Moraga would testify and ordered the parties not to discuss the prospect of his testimony in their opening

statements. The trial judge also granted defense counsel's request to delay her opening statement for nearly two weeks, agreeing that Moraga's potential testimony had been significant and that the defense should be given an opportunity to reengineer its opening statement to remove references to Moraga.

In her opening statement, defense counsel offered two reasons why Smith could not have killed his wife. First, she told the jury that the evidence would show that Smith's whereabouts were accounted for at the time of his wife's murder. Second, she said that the evidence would show that Smith was physically incapable of bludgeoning his wife to death with a heavy fireplace tool because of major shoulder surgery he had undergone a few weeks before the murder. She also told the jury that "there may be evidence that points to other people, but you won't be able to put it all together and know who did it."

In its presentation, the prosecution called over forty witnesses and offered over 220 exhibits. The prosecution presented evidence that Smith was unfaithful to his wife for many years, that his wife was threatening to divorce him, and that he told one of his former employees, Sam Matthews, that the "only way" he or his wife would get out of their marriage was "to die," because he was "not going to give Minnie half of what [he] got so some other man can live off of it."

The prosecution also presented evidence that Smith's DNA was recovered from both the murder weapon and his wife's body. The prosecution also showed that police recovered the missing jewelry from the trunk of Smith's car, and that the duct tape found on the jewelry box was from the same roll as the duct tape used to bind his wife's ankles. Finally, the prosecution presented the expert testimony of a criminologist who opined that the disarray in the Smiths' house was staged.

Like the prosecution, the defense presented a large volume of evidence, calling nearly thirty witnesses and submitting nearly one hundred exhibits. To support Smith's alibi, defense counsel presented evidence of Smith's movements on December 15, 2005. To establish that the seventy-year-old Smith was incapable of committing the murder, defense counsel presented medical evidence showing that he underwent major rotator cuff surgery weeks before themurder, and that surgery would have prevented him from swinging a fireplace tool with enough force to deal the fatal blow.

The defense insinuated that Matthews, and not Smith, murdered Minnie. On cross-examination, Matthews admitted that he owed Smith $15,000 and knew the location of several safes in the Smiths' house. Defense counsel also elicited testimony that, at the time Matthews spoke with investigators, he knew details about the crime scene that the investigators hadn't told him and that he hadn't learned from news reports. In particular, defense counsel asked Matthews about statements he made to investigators in which he imagined how Smith would have gone about the murder:

> Q. And didn't you tell the police that Mr. Smith wouldn't have done it alone?
>
> A. Yeah, I might have said that.
>
> Q. And didn't you say that he would have done it with Nelson Nealy?
>
> A. Probably said that, too.
>
> Q. Yes or no?
>
> A. Yes.
>
> Q. And didn't you say that "he and Nelson Nealy would have done it, and then they would have gone downstairs afterwards

and had a drink"?

A. No I didn't say that.

Contrary to Matthews's testimony, he did tell investigators that whoever killed Minnie Smith went downstairs and had a drink afterward. In fact, a cup of Hennessy cognac was sitting on the downstairs bar when police discovered Minnie Smith's body.

After the defense rested, the trial court held a conference to discuss jury instructions. The prosecution proposed an aiding-and-abetting instruction. The prosecutor argued that the instruction was needed because "if [Smith] didn't swing the murder weapon, it doesn't mean he's not guilty of the crime." Defense counsel strenuously objected, explaining that she previously was unaware that the prosecutor was relying on an aiding-and-abetting theory. She emphasized that throughout the case, there had been no sign that the prosecution was relying on such a theory, and asserted that the instruction would invite the jury to "speculate about a universe of possibilities for which there's absolutely no evidence."

The trial judge nevertheless agreed to give the aiding-andabetting instruction. The judge believed he had a sua sponte duty to do so because there was "considerable evidence" that even if Smith was incapable of swinging the log roller, "he may very well have been an aider and abettor." The judge expressed concern that without an aiding-and-abetting instruction, the jurors would be left without legal guidance in the event they accepted the defense theory but still believed Smith was involved in the murder. In expressing this concern, the trial judge acknowledged that both sides had presented "strong cases" concerning Smith's ability to inflict the fatal blows.

The parties gave closing arguments immediately after the lunch recess. The prosecutor

did not mention aiding and abetting in his initial argument. Instead, he argued that Smith was healthy and strong enough to swing the log roller himself. The prosecutor also emphasized that *only* Smith, and "not some unidentified perpetrator," could have swung the fireplace tool because Smith's was the only DNA found on the tool besides that of Minnie and a crime lab technician.

In her closing argument, defense counsel addressed the possibility that the prosecutor would discuss an aiding-andabetting theory in rebuttal. After arguing that Smith could not have perpetrated the murder, defense counsel told the jury that the prosecutor might argue "a new theory in this case, for the first time ever, here today." Defense counsel then attempted to respond to that theory:

> Now that we've proven [Smith] couldn't have done it, proven there wasn't time, there's going to be a phantom second guy. And Mr. Smith is going to be with that phantom second guy. And that second guy is going to be doing the killing and the lifting and whatnot, even though the prosecution's DNA experts say there's no foreign DNA found in the house.

Defense counsel then suggested that the prosecution was introducing the theory late in the proceedings because "any time we pound down the prosecution theory, they pop up with a new one."

In rebuttal, the prosecutor acknowledged that aiding and abetting was not his theory of the case, but invited the jurors to consider the theory anyway:

> Look, the prosecution theory of the case is the defendant murdered his wife. Left-handed, two-handed, right-handed, using a side blow, it doesn't matter to me. I don't care which one happened. It doesn't matter. . . .

> But the fact of the matter is—and this is just the law—the defendant killed his wife. He wielded that fireplace tool himself. But if you don't believe that—or let's say three of you get back in the deliberations and say, I just don't know. I know he's involved. I know he's lying about the jewelry. He's got the jewelry. He's got the duct tape that matches duct tape from this crime scene. I know he's in on it, but I'm not sure that he could have wielded that weapon.
>
> Well, guess what? You don't have to be. And that's the law . . . .
>
> The prosecution theory: he killed her before he left the house and he went to work. Does it matter if you buy that theory? No, it doesn't, because he doesn't even have to be there. He doesn't even have to be the one who wielded the murder weapon. He was. And he did.
>
> And half of you can think it was one way and the other half think it's the other way, doesn't matter. That's still a guilty verdict.

After closing arguments, the trial judge rejected defense counsel's renewed request to not give the aiding-and-abetting instruction. The trial judge then instructed the jury on aidingand- abetting liability in addition to principal liability. In a general verdict, the jury convicted Smith of first-degree murder as charged in the information.

B

On direct appeal, the California Court of Appeal reversed Smith's conviction. Citing *People v. Perez*, 113 P.3d 100, 104 (Cal. 2005), the court explained that before a jury may convict a defendant under an aiding-and-abetting theory, the prosecution must prove that someone other than the defendant committed the crime. The court then held that

because "no proof was presented that another person participated in accomplishing" the killing of Minnie Smith, "the evidence failed to support the [trial court's] giving of aiding and abetting instructions in this case." The court noted that "the prosecutor proceeded solely on the theory defendant killed his wife." Finally, the court held that the trial court's instructional error prejudiced Smith's trial.

On review, the California Supreme Court vacated the court of appeal's decision and remanded for reconsideration of the prejudice determination in light of *People v. Guiton*, 847 P.2d 45 (Cal. 1993). *Guiton* had applied the U.S. Supreme Court's decision in *Griffin v. United States*, 502 U.S. 46 (1991), holding that where a jury is presented with two theories of guilt, one factually supported and the other not, "the appellate court should affirm the judgment unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in factfound the defendant guilty solely on the unsupported theory." 847 P.2d at 53.

Applying the *Guiton/Griffin* prejudice standard, the court of appeal then concluded that the factually unsupported instruction was not prejudicial error because there was no affirmative indication in the record that the jury based its guilty verdict *solely* on aiding and abetting. [FN1] The court pointed first to the prosecutor's own ambivalence in rebuttal about the aiding-and-abetting theory. The court also cited the jury's requests during deliberations to examine the fireplace tool and Smith's medical records. The court said these requests indicated that the jury was focused on whether Smith had the strength to beat his wife to death, and not on whether he aided and abetted someone else.

[FN1] In doing so, the court of appeal apparently maintained its previous bconclusion that, contrary to what the trial judge determined, the aidingand-abetting instruction was not supported by the evidence because the

prosecution presented no proof that another person participated in the murder.

After determining that the trial court's aiding-andabetting instruction was not, by itself, prejudicial error, the court of appeal also rejected Smith's claim that the prosecution failed to provide him with constitutionally adequate notice of its aiding-and-abetting theory. First, the court explained, quoting *People v. Diaz*, 834 P.2d 1171, 1203 (Cal. 1992), that "'under [California's] statutory scheme, an accusatory pleading charging a defendant with murder need not specify the theory of murder on which the prosecution intends to rely.'" Based on this established state rule, the court held that the information provided Smith with adequate notice that he could be liable as an aider and abettor.

Next, the court of appeal acknowledged, quoting *Diaz*, 834 P.2d at 1203, that "'there are situations in which the United States Constitution may require greater specificity'" concerning the basis for the defendant's liability. It then concluded that the evidence at Smith's preliminary examination provided that additional specificity. Specifically, the court pointed to the preliminary hearing testimony of Detective McShane about the incriminating statements that David Moraga claimed Smith made while they were housed together in the same cell. The court found that this testimony "suggests defendant may not have personally committed the murder." The court therefore concluded that "even in the absence of an aider and abettor liability allegation in the information, the evidence presented at defendant's preliminary examination meaningfully apprised him of the potential for an aiding and abetting theory."

Finally, the court of appeal found that the prosecution did not "ambush" Smith with the aiding-and-abetting theory because "[t]he prosecution's request for aiding and abetting liability instructions occurred during the parties' general discussion of the

jury instructions and not just prior to closing argument," and because the prosecution only mentioned the aiding-and-abetting theory in its rebuttal argument. The court affirmed Smith's conviction. The California Supreme Court denied a petition for review without citation or comment. In his federal habeas petition, Smith again claimed that his constitutional right to adequate notice of the nature of the charges against him was violated when the trial court instructed the jury on aiding-and-abetting liability.[FN2] Thedistrict court agreed and adopted the magistrate judge's recommendation to grant Smith's petition. The state timely appealed.

[FN2] In addition to his notice claim, Smith raised another claim not at issue in this appeal.

II

We review de novo the district court's decision to grant a habeas petition, and we review the district court's underlying factual findings for clear error. *Merolillo v. Yates*, 663 F.3d 444, 453 (9th Cir. 2011). We may affirm the district court's decision on any ground supported by the record, even if it differs from the district court's rationale. *Id.*

Because Smith filed his federal habeas petition after April 24, 1996, we apply 28 U.S.C. § 2254 as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104–132, 110 Stat. 1214. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Under § 2254, a state prisoner may not obtain federal habeas relief for any claim that was adjudicated on the merits by a state court unless the state court's decision was (1) "contrary to" clearly established federal law as determined by the Supreme Court, (2) "involved an unreasonable application of' such clearly established law, or (3) "was based on an unreasonable determination of the facts" in light of the record before the state court. 28 U.S.C. § 2254(d); *Harrington v. Richter*, 131 S. Ct.

770, 785 (2011).

A

The Sixth Amendment and basic principles of due process guarantee a criminal defendant the fundamental right to be informed of the nature and cause of the accusations against him so that he may have a meaningful opportunity to prepare an adequate defense against every issue raised by those accusations. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . ."); *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceedings in all courts, state or federal."); *In re Oliver*, 333 U.S. 257, 273 (1948) ("A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence . . . ."). Notice must be sufficiently detailed to enable a defendant to address all the relevant issues in his defense. *Russell v. United States*, 369 U.S. 749, 766–68 (1962) (Sixth Amendment violated where an indictment left the "chief issue undefined," thereby allowing "the prosecution free to roam at large" and present the defendant "with a different theory, or . . . no theory at all" at every stage of the criminal proceedings). Therefore, we have repeatedly recognized that a defendant who is charged with first-degree murder is entitled to notice of what specific theory of murder the prosecution intends to pursue. *See, e.g.*, *Murtishaw v. Woodford*, 244 F.3d 926, 953–54 (9th Cir. 2001) (right to notice of the prosecution's felony-murder theory); *Morrison v. Estelle*, 981 F.2d 425, 428 (9th Cir. 1992) (same); *Sheppard v. Rees*, 909 F.2d 1234, 1235 (9th Cir. 1990) (same); *Givens v. Houseright*, 786 F.2d 1378, 1380–81 (9th Cir. 1986)

(right to notice of the prosecution's murder-by-torture theory).

The starting point for determining whether a defendant received adequate notice of the charges against him is the charging document. *Gautt v. Lewis*, 489 F.3d 993, 1003 (9th Cir. 2007). The charging document "must in some appreciable way apprise the defendant of the charges against him so that he may prepare a defense accordingly." *Id.* at 1004; *Givens*, 786 F.2d at 1380. When the charging document does not specify the prosecution's theory of a crime, trial and pretrial proceedings may nonetheless provide a defendant with constitutionally adequate notice. For example, a defendant may receive notice of the prosecution's theory from the prosecutor's opening statement, *see Murtishaw*, 255 F.3d at 954; *Calderon v. Prunty*, 59 F.3d 1005, 1009 (9th Cir. 1995), or the evidence presented at trial, *see Murtishaw*, 255 F.3d at 954; *Morrison*, 981 F.2d at 428–29.[FN3] We also may examine the trial record to determine whether the defendant knew that a particular theory was on the table. *See Murtishaw*, 255 F.3d at 954.

[FN3] In *Morrison*, we held that a defendant received constitutionally adequate notice of the prosecution's felony-murder theory in part through the jury instructions the prosecutor submitted two days before closing arguments. 981 F.2d at 428–29. However, more recently we found the argument "troublesome" that "jury instructions or closing arguments—sure signs that the *end* of a trial is drawing near—could substitute for sufficient notice to a defendant of the charges that have been leveled against him." *Gautt*, 489 F.3d at 1010 (emphasis in original). A jury instruction "cannot itself serve as the requisite notice of the charged conduct, coming as it does *after* the defendant has settled on a defense strategy and put on his evidence." *Id.* Nevertheless, in *Gautt* we

> assumed without deciding that jury instructions "can be parsed for evidence of notice to the defendant." *Id.*

In limited circumstances, the actions of the prosecution may lead the defendant to reasonably believe that a particular theory is off the table, notwithstanding any prior notice from the charging document. In *Sheppard v. Rees*, the information charged the defendant with one count of murder under California Penal Code § 187, and the prosecution tried the case on the theory that the defendant personally committed premeditated murder. 909 F.2d at 1235. The concept of felony-murder was never mentioned, directly or indirectly, during the pretrial proceedings, opening statements, or trial. *Id.* Nor was there any mention of felony-murder when the judge settled the jury instructions. *Id.* But the morning after the instructions conference, and just before closing arguments, the prosecution requested an instruction on felony-murder, which the trial court gave over a defense objection. *Id.* at 1235–36. On appeal, we agreed with the state's concession that under the circumstances of that case, the felony-murder instruction violated the defendant's against him because "a pattern of government conduct affirmatively misled the defendant, denying him an effective opportunity to prepare a defense." *Id.* at 1236 (emphasis removed). The principal evil, we explained, was that

> the prosecutor "ambushed" the defense with a new theory of culpability after the evidence was already in, after both sides had rested, and after the jury instructions were settled. This new theory then appeared in the form of unexpected jury instructions permitting the jury to convict on a theory that was neither subject to adversarial testing, nor defined in advance of the proceeding.

Id. at 1237.

Sheppard was a "narrow ruling," and we have distinguished it where the facts of a case varied even slightly. For example, in *Morrison* we held that the defendant had adequate notice of the prosecution's felony-murder theory from the evidence presented at trial. 981 F.2d at 428. We also held that the defendant was not "ambushed" by the felony-murder theory because defense counsel had a full two days to prepare for closing arguments after the prosecution requested a felony-murder theory. *Id.* Likewise, in *Stephens v. Borg* we found no ambush where defense counsel had five days to prepare for closing arguments after receiving notice of the prosecution's intention to rely on a felony-murder theory. 59 F.3d 932, 936 (9th Cir. 1995).

Nonetheless, *Sheppard* remains instructive. Although it was a pre-AEDPA case, it faithfully applied the principles enunciated by the Supreme Court in *Cole*, *Oliver*, and *Russell*.

B

The district court correctly concluded that Smith's right to notice of the nature of the charges against him was violated when the trial court gave the prosecution's requested aidingand- abetting instruction. This case is indistinguishable from *Sheppard*: by requesting the jury instruction just before closing argument and without any prior indication that it was pursuing an aiding-and-abetting theory, the prosecution ambushed Smith and denied him a meaningful opportunity to prepare his defense.

The information charging Smith with first-degree murder was initially sufficient to put him on notice that he could be convicted either as a principal or as an aider-and-abettor. *See Carothers v. Rhay*, 594 F.2d 225, 229 (9th Cir. 1979) (holding that a defendant who was charged with first-degree murder had constitutionally adequate notice that he could be convicted as an aider and abettor; under state law,

anyone who participated in the commission of a crime was liable as a principal regardless of his level of participation). In California, aiding and abetting a crime is the same substantive offense as perpetrating the crime, so aiders and abettors may be punished as principals. Cal. Penal Code § 31; *People v. Jenkins*, 997 P.2d 1044, 1130 (Cal. 2000).

However, notwithstanding any notice provided by the information,, the prosecution's conduct throughout the pretrial and trial proceedings affirmatively led Smith to reasonably believe that it would not rely on an aiding-and-abetting liability theory. At the very beginning of his opening statement, the prosecutor told the jury that "the evidence will show that *that man* over there at the end of counsel table [i.e., Smith], wearing the nice sweater, *murdered his wife* of 27 or 28 years, and then *he* staged the crime scene to make it look like a burglary to avoid detection." (emphasis added). Later, the prosecution again told the jury that "the *defendant bludgeoned* [Minnie Smith] to death, *bound her arms* behind her with a wire coat hanger, and then staged the scene to look like a burglary." (emphasis added). Neither statement permits the interpretation that Smith acted with or through another person, so the prosecution made clear that it was pinning Smith as the sole perpetrator of the murder. *Cf. Murtishaw*, 255 F.3d at 954 (finding that the defendant received adequate notice of the prosecution's theory of the murder from the prosecutor's opening statement).

Like its opening statement, the prosecution's case-in-chief precluded the possibility that a third person was involved in Minnie Smith's murder. The prosecution introduced evidence showing that the DNA found on Minnie Smith's body, the murder weapon, and other objects at the murder scene matched the DNA of only three people: Marvin Smith, Minnie Smith, and a crime lab technician who visited the murder scene. From these actions, Smith reasonably could have drawn the inference that the

prosecution was not trying him as an aider and abettor. Indeed, the prosecution's initial closing argument confirmed that inference: it emphasized how easy it is for a person's DNA—such as the DNA of the crime lab technician—to end up on objects in their presence, and then argued that the absence of another individual's DNA at the murder scene meant that *no unidentified perpetrator* could have killed Minnie Smith.

Conversely, and as the California Court of Appeal recognized, the prosecution presented *no evidence* at trial to support an aiding-and-abetting theory. Therefore, unlike those cases where we have found constitutionally adequate notice from the presentation of evidence, there was nothing at trial that might have indicated to Smith that aiding-andabetting liability was on the table. *Cf. Carothers*, 594 F.2d at 229 (holding that there was notice of an aiding-and-abetting theory where the defendant was charged with first-degree murder and the evidence showed that another person accompanied the defendant to the scene of the crime).

Smith's conduct at trial further supports the conclusion that he had no meaningful notice of the prosecution's intent to pursue an aiding-and-abetting theory. *See Murtishaw*, 255 F.3d at 954 (explaining that we may examine the defendant's conduct for evidence of constitutionally adequate notice). Defense counsel presented an alibi and argued that Smith was physically incapable of bludgeoning his wife to death. These defenses would have been meaningless against an accusation that he somehow assisted or worked through another person to kill Minnie Smith. Furthermore, unlike the defendant in *Murtishaw*, Smith never questioned any witnesses with respect to the possibility that he participated in the murder with another person. *See id.*

Unlike the defendants in *Morrison* and *Stephens*, who had several days after the jury instructions conference to prepare an argument to

counteract the prosecution's unexpected theory, closing arguments in this case commenced almost immediately after the trial judge agreed to give the unexpected instruction. *Cf. Stephens*, 59 F.3d at 936; *Morrison*, 981 F.2d at 428. In fact, defense counsel had only the lunch recess to formulate a response to the prosecution's new theory, and the prosecutor waited until his rebuttal to raise the aiding-and-abetting theory, depriving defense counsel of any opportunity to actually respond. As in *Sheppard*, the prosecution here requested the new instruction the same day as closing arguments. *See* 909 F.2d at 1235–36. Moreover, unlike *Morrison*, there was no evidence presented at Smith's trial to give him any inkling that the prosecution would ask for an aiding-and-abetting instruction. *Cf.* 981 F.2d at 428. Therefore, Smith's constitutional right to notice, under *Cole*, *Oliver*, and *Russell*, was violated.

The state argues that Smith should have been aware that aiding-and-abetting liability was on the table because his defense theory necessarily implied that another person murdered his wife. Contrary to the state's logic, implying that someone else killed the victim does not necessarily invoke a new question as to aiding and abetting. Indeed, the defense theory was that Matthews had an independent motive to burglarize the house, and he knew facts about the murder scene unknown to others. However, pointing his finger at Matthews did not automatically implicate Smith as Matthews's accomplice, and it certainly did not show that he knew the *prosecution* was pursuing an aiding-and-abetting theory. Similarly, Matthews's statements on crossexamination that Smith would have acted with a man named Nelson Nealy to kill Minnie did not raise the possibility of aiding-and-abetting liability. Matthews's comments were totally uncorroborated and speculative, and were in answer to a larger line of questions by which defense counsel tried to suggest that Matthews may have been the murderer.

The state also echoes the California Court of Appeal's conclusion that the preliminary hearing testimony of Detective McShane "meaningfully apprised" Smith of the potential for an aiding-and-abetting theory."[FN4] It is puzzling, however, how anyone could divine even a remote possibility of an aiding-and-abetting theory from the preliminary hearing transcript. Moraga's statements to Detective McShane suggested only that Smith had a motive to kill his wife and that he took several steps to make the house appear as if it had been burglarized. His statements did not indicate that Smith took these steps so that some other, unmentioned person could enter the house and commit the murder. Nor did defense counsel's cross-examination of Detective McShane raise the possibility that the prosecution would pursue an aiding-and-abetting theory. When defense counsel asked the detective whether Moraga knew any details about the murder—including the manner of the killing, who specifically did the killing, and when the killing occurred—she was seeking to impeach Moraga's credibility by showing that Moraga, after spending six months in a cell with Smith, knew very little about the crime that he claimed Smith confessed to committing. By impeaching Moraga, the defense did not acknowledge that the prosecution was pursuing an aidingand-abetting theory. Indeed, it does not even appear that the defense's cross-examination gave the *prosecution* that idea—the prosecution's trial brief and motions in limine, filed nearly three months after the preliminary hearing, argued that Moraga's testimony served only to identify *Smith* as the perpetrator.

> [FN4] The district court clearly erred in stating that Smith accepted this conclusion. Smith challenged it in his federal habeas petition, and he continues to challenge it on appeal.

In sum, the prosecution tried its case on one theory—that Smith directly perpetrated his wife's murder. The prosecution presented no evidence in support of aiding-and- abetting liability, and its

opening statements and case-in-chief seemed to firmly preclude the possibility that an unidentified person killed Minnie Smith. Until the jury instructions conference, no one had ever mentioned the possibility of an aiding-and-abetting theory. Therefore, when the trial court instructed the jury on aiding-and-abetting liability, Smith was "ambushed" and his fundamental right to notice of the nature of the accusations against him was denied in violation of *Cole*, *Oliver*, and *Russell*.

C

The district court correctly determined that the trial court's error in instructing the jury in aiding-and-abetting liability was not harmless. We must grant relief if the constitutional error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). Reversal is required where "the record is so evenly balanced that a 'conscientious judge is in grave doubt as to the harmlessness of an error.'" *Gautt*, 489 F.3d at 1016 (quoting *O'Neal v. McAninch*, 513 U.S. 432, 438 (1995)).[FN5]

[FN5] The Supreme Court has not stated definitively whether a violation of the Sixth Amendment right to notice is subject to harmless error analysis. *Gautt*, 489 F.3d at 1015. In *Sheppard*, we decided that violation of the Sixth Amendment right to notice was structural error requiring automatic reversal. 909 F.2d at 1238. However, in *Gautt* we questioned that part of *Sheppard* because it predated several Supreme Court decisions stressing the limited category of structural errors. *Gautt*, 489 F.3d at 1015. However, we declined to reach that issue in *Gautt*, because we found that the error in that case was not harmless. *Id.* at 1016. We do the same here because we conclude that the trial court's error was not harmless.

Here, the trial judge acknowledged that Smith presented a strong defense and that the evidence on both sides was closely balanced. The California Court of Appeal expressed a similar assessment in its first decision, which described Smith as presenting "an arguably successful defense concerning his identity as the perpetrator of a crime." Given this evenly balanced record, and the fact that the prosecutor invited the jury to speculate—at the last minute and without any evidence—about Smith's liability as an aider and abettor, the district court was correct to have grave doubts about the validity of the jury's verdict.

D

For the purpose of determining whether § 2254(d) bars habeas relief, we review the last reasoned state-court decision. *Gill v. Ayers*, 342 F.3d 911, 917 n.5 (9th Cir. 2003). Here, because the California Supreme Court denied Smith's petition for review without citation or comment, we "look through" the California Supreme Court's decision to the California Court of Appeal's second decision, in which it affirmed Smith's conviction on remand from the California Supreme Court. *Id.* Section 2254(d) does not bar habeas relief where the state court's decision was "based on an unreasonable determination of the facts" in light of the record before the state court. 28 U.S.C. § 2254(d)(2).

A state court's determination of facts is unreasonable"where the state court[] plainly misapprehend[s] or misstate[s] the record in making [its] findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim." *Id.* at 1001. Here, the California Court of Appeal determined that Detective McShane's preliminary hearing testimony about statements Smith purportedly made to Moraga "meaningfully apprised [Smith] of the potential for an aiding and abetting theory." But, as we have noted above, the

purported statements simply do not support such a theory. The California Court of Appeal also determined that "[t]he prosecution's request for aiding and abetting liability instructions occurred during the parties' general discussion of the jury instructions and *not just prior* to closing argument." (emphasis added). This is also a misstatement of the record. Just as in *Sheppard*, the prosecution requested, and the trial judge decided to issue, the aiding-and-abetting instruction on the morning of the day of closing arguments. *See* 909 F.2d at 1235. Defense counsel had only the lunch recess to formulate a response to the new theory.

At oral argument, the state suggested that the trial court's error in giving the aiding-and-abetting instruction should be analyzed solely under *People v. Guiton* and *Griffin v. United States*. 847 P.2d at 51. Under those cases, reversal of a conviction is not required solely because a jury is instructed on a factually unsupported theory. *Griffin*, 502 U.S. at 60; *Guiton*, 847 P.2d at 52. Rather, "the appellate court should affirm the judgment unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." *Guiton*, 847 P.2d at 53; *see Griffin*, 502 U.S. at 59. Here, the California Court of Appeal concluded that under *Guiton*, the trial court's error did not require reversal of Smith's conviction because there was no affirmative indication in the record that the jury based its guilty verdict *solely* on the factually unsupported aiding-and abetting theory. The state suggests that because the California Court of Appeal's decision with respect to the *Guiton* question was neither "contrary to" nor "an unreasonable application of" *Griffin*, § 2254(d)(1) precludes federal habeas relief on Smith's Sixth Amendment notice claim.

This argument conflates two fundamentally different inquiries. Whether the trial court's factually unsupported aiding-and-abetting instruction

required reversal by itself is a separate question from whether Smith had adequate notice of—and a meaningful opportunity to defend against—the prosecution's aiding-and-abetting theory.[FN6] *Griffin* and *Guiton* concern only the former, while the Sixth Amendment, *Cole*, and *Sheppard* concern the latter.

[FN6] The California Court of Appeal also treated these as separate issues.

In *Griffin*, there was never any doubt about what crime the defendant was charged with and what theories the prosecution was trying to prove: the defendant was charged with one count of conspiracy with two objects—(1) defrauding the Internal Revenue Service, and (2) defrauding the Drug Enforcement Agency ("DEA")—and the prosecution always sought to prove both. 502 U.S. at 47. But because certain testimony anticipated by the prosecution failed to materialize, there was insufficient evidence to connect the defendant to the DEA object. *Id.* at 48. Likewise, in *Guiton* the defendant was charged with one count of selling *or* transporting cocaine, and the prosecution sought to prove that the defendant transported cocaine *and* that he sold it. 847 P.2d at 46–47. The problem was that the prosecution failed to present sufficient evidence in support of its theory that the defendant sold cocaine, and the reviewing court could not definitively determine from the general verdict whether the jury convicted based on the valid theory of transportation or the invalid theory of sale. *Id.* at 47.

Because in both *Griffin* and *Guiton*, it was clear from the beginning what theories the prosecution sought to prove, the defendant's Sixth Amendment right to notice of the nature of the accusations was not implicated. *Griffin*, 502 U.S. at 47; *Guiton*, 847 P.2d at 46–47; *see also Griffin*, 502 U.S. at 48 (explaining that it was unnecessary to discuss the Sixth Amendment). The only question in those cases was whether courts should automatically

reverse based on the assumption that, absent a contrary indication in the record, the jury based its verdict on a factually unsupported theory of the crime. In contrast, in cases interpreting the Sixth Amendment's guarantee of notice, the problem was that the prosecution did *not* articulate the specific charges, enhancements, or theories which it sought to prove. *See, e.g.*, *Russell*, 369 U.S. at 766–68; *Gautt*, 489 F.3d at 998–99; *Sheppard*, 909 F.2d at 1235; *Givens*, 786 F.2d at 1380. The Sixth Amendment notice problem is separate and unrelated to the question of whether a factually unsupported jury instruction, by itself, requires reversal.

For similar reasons, as we have already noted, the California Court of Appeal's determination that Smith was not prejudiced under the *Guiton* standard does not preclude us from holding that Smith was prejudiced by the trial court's violation of his fundamental right to notice of the accusations against him. *Guiton*'s prejudice standard is different from the *Brecht* harmless error standard, which applies to the violation alleged here. Under *Guiton*, courts must affirm a conviction unless the record affirmatively indicates that the jury based its verdict *solely* on the unsupported theory of liability. *Guiton*, 847 P.2d at 53. By contrast, under *Brecht* federal courts must reverse a conviction if a constitutional error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623. The *Brecht* standard is different, and less demanding, than the *Guiton* standard. *Cf. Mancuso v. Olivarez*, 292 F.3d 939, 950 (9th Cir. 2002) ("'The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.'" (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946))). Accordingly, we are not constrained by § 2254(d)(1) in deciding that the trial court's error in this case was not harmless. *See Williams v. Taylor*, 529 U.S. 362, 406 (2000).

CONCLUSION

The prosecution's conduct affirmatively led Smith to believe it would not rely on an aiding-and-abetting liability theory. Thus, the aiding-and-abetting jury instruction violated Smith's fundamental right to receive notice of the nature of the charges against him and have a meaningful opportunity to prepare a defense. Given the closely balanced evidence, we cannot say that the trial court's error was harmless. Therefore, we affirm the judgment of the district court granting a conditional writ of habeas corpus.

AFFIRMED.

FILED April 24, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SA CV 11-1076 ODW (MRW)

MARVIN VERNIS SMITH,
Petitioner,
v.
RAUL LOPEZ, Warden,
Respondent.

JUDGMENT

Pursuant to the Order Accepting Findings and Recommendations of the United States Magistrate Judge, IT IS ADJUDGED that the petition is granted.

Dated: April 24, 2012

_____
HON. OTIS D. WRIGHT II
UNITED STATES DISTRICT JUDGE

FILED April 25, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SA CV 11-1076 ODW (MRW)

MARVIN VERNIS SMITH,
Petitioner,
v.
RAUL LOPEZ, Warden,
Respondent.

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court reviewed the petition, the records on file, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Reportto which Respondent has objected. The Court accepts the findings and recommendation of the Magistrate Judge.

IT IS ORDERED that Judgment be entered granting the petition and that Respondent either release or retry Petitioner within 90 days from the date of this order.

DATE: April 25, 2012

_____
HON. OTIS D. WRIGHT II
UNITED STATES DISTRICT JUDGE

FILED February 28, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SA CV 11-1076 ODW (MRW)

MARVIN VERNIS SMITH,
Petitioner,
v.
RAUL LOPEZ, Warden,
Respondent.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Otis D. Wright II, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. INTRODUCTION

A jury convicted Petitioner for the brutal murder of his wife. For most of the trial, the prosecution contended that Petitioner acted alone in committing the murder. However, after the close of the evidence, the prosecutor requested that the trial court instruct the jury that it could convict Petitioner for aiding and abetting another, unidentified person who was the actual killer.

The state appellate court initially reversed Petitioner's conviction. That court concluded that the lack of evidence of an accomplice and the prosecution's last-minute change of theory unfairly prejudiced the defense. The state supreme court vacated the decision, however. The appellate court later affirmed the conviction.

On habeas review, this Court concludes that the late introduction of the aiding-and-abetting theory at trial violated Petitioner's right to due process. The state appellate court ruled that the defense had adequate notice of the prosecution's aiding-and-abetting theory based on one witness's statement presented at a preliminary hearing. However, on the first day of trial, the judge learned that this witness refused to testify. The trial judge then expressly ordered the parties not to refer to the witness. The judge's order essentially prohibited the prosecution from pursuing its aiding-and-abetting liability at trial. In its second decision addressing Petitioner's due process / lack of notice claim, though, the state appellate court ignored the existence of the trial judge's order and the circumstances that led to the exclusion of this evidence. That was a major omission, and constitutes an unreasonable determination of the facts in this case.

The evidence at trial of Petitioner's guilt was not overwhelming. As a result, the Court concludes that the state court's constitutional error here was not harmless. The Court therefore recommends that a writ of habeas corpus be issued, and that the state either retry Petitioner for the homicide or dismiss the action.

II. FACTS AND PROCEDURAL HISTORY

A. The Murder Trial

The victim, Minnie Smith, was found partially clothed in the bedroom of her home. She was killed by a crushing blow to the head from a fireplace tool. Medical evidence showed additional minor injuries, although it was not clear whether the wounds were inflicted before or after her death. When the police arrived at the scene, the house was in a state of disarray – as if it had been burglarized. Several weeks after the killing, Petitioner was arrested and charged with murdering his wife.

1. The Prosecution Case

At trial, the prosecution accused Petitioner of committing the murder by himself, and of staging the burglary and injuries to his wife's body to mislead investigators. The prosecution presented evidence that Petitioner was unfaithful to his wife for many years. From this, the prosecution argued that Petitioner had a motive to kill his wife – instead of divorcing her and thereby sharing the couple's substantial assets.

As proof of Petitioner's direct involvement in his wife's killing, the prosecution pointed to: the recovery of Petitioner's DNA from the victim's body; the police found jewelry that Petitioner claimed was stolen from the residence in the trunk of his car; and scientific evidence linking packing tape near the victim's body with tape found on the box with the jewelry in Petitioner's car. Additionally, the prosecution presented expert testimony from a criminologist who opined that the condition of the residence appeared to have been staged and was not the result of a real burglary. The prosecution emphasized implausible aspects of the crime scene (weapons and valuables not stolen from the residence; the bizarre injuries inflicted on the victim) and Petitioner's incongruous actions, statements, and lack of emotion following the discovery of the murder as additional proof of his culpability.

2. The Defense Case

Petitioner vigorously defended the case. The defense retained and presented expert evidence from: a forensic pathologist (challenging the time-of-death assumptions of the government's expert); a criminologist (opining that the home did appear to have been burglarized); and a pottery specialist (explaining why an expensive vase could have survived a fall onto a tile floor from a burglar's entry or exit though a nearby window).

Additionally, the defense presented medical evidence that Petitioner – a 70-year-old man who had recently had a major shoulder operation – was physically incapable of inflicting the killing blow to his wife. The defense presented detailed documentary and testimonial evidence of Petitioner's movements throughout Southern California on the day of the killing to establish an alibi. Petitioner's first wife also testified to refute the significance of the jewelry found in the car.

3. The Missing Jailhouse Informant

At the preliminary hearing, the prosecution offered additional evidence linking Petitioner to the crime – a confession that Petitioner allegedly made to a jailhouse informant. The lead police investigator testified that the informant (Moraga) said that Petitioner admitted participating in the crime because his wife wanted to divorce him due to his infidelity. The informant stated that Petitioner admitted that he staged the burglary. The informant also said that Petitioner left the house unlocked with the home alarm off, which implied that another individual later entered the house and killed the victim. (This formed the basis of the aidingand-abetting theory as identified by the appellate court (discussed below).) According to the informant, Petitioner gave no details about the actual killing and did not identify any other individual involved in the homicide.

Midway through the prosecution's opening statement at trial, the defense learned that the informant refused to testify at trial. The trial court excused the jury and conducted a special hearing at the defense's request. The informant's defense lawyer and a supervising public defender testified at the hearing about the circumstances of the informant's unwillingness to testify.[FN1]

FN1 The informant's defense attorneys claimed that the prosecutor threatened to

> enhance the informant's criminal sentence if he did not testify consistent with his earlier statement to investigators regarding Petitioner's admissions. The circumstances of the alleged threat are irrelevant to the pending habeas matter. What is relevant is that, after interacting with the prosecution, the informant invoked his Fifth Amendment privilege and refused to testify at all. (Lodgment # 2, 2 RT at 379-80.)

At the conclusion of the lawyers' testimony, the court agreed to recess the trial for nearly two weeks. The defense lawyer complained that a substantial part of her planned opening statement would have addressed the anticipated testimony of the informant who, as discovered on the eve of trial, might not testify at all. The court agreed that a continuance was appropriate to allow the defense to revise the opening statement and its overall strategic approach to the trial.

In ruling on the defense request for a continuance, the court expressly acknowledged the significance of the informant's potential testimony and the impact of his refusal to testify for the prosecution:

> I am going to instruct both sides not to discuss the prospect of Mr. Moraga's testimony in their opening statements at this point. Based on what I do hear from [the informant's attorney], I am of the view that there is not sufficient basis for either side to entertain a good faith belief that he is going to be called. So I'm going to preclude [the] prosecution from commenting about the prospect of Mr. Moraga's testimony or what he is going to say if he testifies in their opening statement.
>
> With respect to the defense request to continue their opening statement [from

> November 1] until Tuesday, November 13th, that request is granted. I do agree with the defense that because of this information that's come to light today, opening statement is strategically a significantly important part of both sides' case.
>
> I realize that [the] issue of Mr. Moraga is a big basket that you may have put many of your eggs in. The prospect – I think it's fair to say, the doubtfulness of Mr. Moraga's testimony in this case I think, in fairness to the defense, the defense should be given an opportunity to reengineer its opening statement in such a way that the issue of Mr. Moraga isn't talked about[.]

(Lodgment # 2, 2RT at 424) (emphasis added).

The trial judge was correct to doubt whether the prosecution would eventually call the informant as a witness. Despite being held in a cell in the courthouse during the duration of the trial, the informant did not testify in the prosecution's case. Toward the end of the evidentiary presentation, the prosecutor again addressed the issue. The prosecutor specifically told the trial court that "I am not going to use him [Moraga] in my case in chief. In the event that the defendant testifies, I may reassess that." (Lodgment # 2, 10 RT at 2059.) Neither Petitioner nor the informant testified at the murder trial.

Notably, the prosecution presented no evidence at trial to establish that anyone other than Petitioner killed the victim or was involved in the crime. To the contrary, from the outset of the trial, the prosecution presented evidence consistent with its theory that Petitioner personally killed the victim. The prosecutor dramatically opened the case by stating, "that man over there at the end of counsel table, wearing a nice sweater, murdered his wife of 27 or 28 years, and then he staged the crime scene to make it look like a burglary and to avoid detection. That's

what the evidence will show." (Lodgment # 2, 2RT at 288.)

Both sides presented considerable amounts of evidence during the closely contested trial. The prosecution called over 40 witnesses and offered over 220 exhibits into evidence. The defense called nearly 30 witnesses, submitted almost 100 exhibits, and forcefully cross-examined many of the government's witnesses. The trial lasted over one month. The transcript of the proceedings (including pretrial proceedings) fills 16 volumes.

4. The Aiding-and-Abetting Jury Instruction

After the close of evidence, the trial court met with the parties to discuss jury instructions. The prosecution submitted a set of proposed instructions that included a request for an instruction on the elements of aiding-and-abetting liability. (Lodgment # 2, 15 RT at 2878.) The prosecutor noted that the defense theory of the case was that Petitioner "did not or could not have committed the crime himself [due to his shoulder injury.] But that doesn't mean that, if he didn't commit the crime himself, that if they find that he aided and abetted in the crime, that he's still not guilty of the crime." (Id. at 2882.) The prosecutor expressed concern that, "if he didn't swing the murder weapon, it doesn't mean that he's not guilty of the crime[.] And I think the jury needs to be instructed on that." (Id. at 2882-83.)

The defense vehemently objected to the proposed instruction during the conference and in a written filing submitted the next day. Among the reasons that the defense attorney asserted in opposition to the instruction was that, "I have, up until I received this instruction, never heard that the prosecutor was relying on a theory of [aiding and abetting] culpability[.] Throughout this case, there's been absolutely no sign that this was the People's theory." (Id. at 2884.) The defense also argued that

there was no evidence that Petitioner actually aided or abetted another individual in committing the murder to support such an instruction.

The trial judge did not take up the question as to whether the prosecution previously asserted an aiding-and-abetting theory during the trial. Rather, the judge believed that he had a sua sponte obligation to give the instruction based on the prosecution's request. (Id. at 2884.) The court concluded (erroneously, as the California Court of Appeal later ruled) that there was evidence showing that Petitioner might have been involved in or benefitted from the offense even if he was not physically capable of committing the crime. (Id. at 2886.)

Additionally, midway through the defense closing, the judge confirmed with the prosecutor, "Is aiding and abetting a theory that you are relying on in this case?" The prosecutor responded, "Yes, Your Honor." (Lodgment # 2, 16 RT at 3034.) The court then reiterated that "the jury needs to be instructed on [ ] aiding and abetting." (Id. at 3037.) At no point in the jury instruction colloquy did the trial judge refer to his ruling during opening statements in which he prohibited the parties from mentioning the non-testifying informant.

5. Closing Arguments

The prosecution did not address the aiding-and-abetting theory in its first presentation during closing argument. The defense attorney preemptively touched on the issue by suggesting that, on rebuttal argument, the prosecution would argue "a new theory in this case, for the first time ever, here today. I predict you're going to hear the prosecution say [in its rebuttal argument] there had to be a second person involved." (Lodgment # 2, 16 RT at 3055.) The defense stated that, "Now that we've proven that [Petitioner] couldn't have done it[,] there's going to be a second phantom guy who killed the victim for

Petitioner." The defense then argued that Petitioner did not aid or abet another individual in the homicide.

In rebuttal, the prosecution took up the aiding-and-abetting issue ambivalently. The prosecutor affirmatively stated that the theory of the case was that "the defendant murdered his wife. Left-handed, two-handed, right-handed, using a side blow, it doesn't matter to me." (Id. at 3111.) However, the prosecutor acknowledged that several jury members could conclude that Petitioner was physically unable to kill his wife, but they "know he's in on it." The prosecutor argued that Petitioner could be found guilty of the crime for aiding and abetting the unidentified, actual killer. The prosecutor invited the jury to explore both direct and indirect liability for Petitioner, stating that "half of you can think it was one way and the other half think it's the other way, doesn't matter. That's still a guilty verdict." (Id. at 3113.) The prosecutor noted, "I could care less which one you believe." (Id. at 3112.)

After the conclusion of the lawyers' arguments and before the court instructed the jury, the defense lawyer again asked the court not to give the aidingand- abetting instruction. The lawyer noted that the prosecutor brought up the aiding-and-abetting concept hesitantly in the rebuttal closing argument, and in an ambivalent and confusing manner. The prosecutor suggested that it discussed the theory because "it was the court's position that the aiding and abetting instruction has to be given." The defense lawyer explained, however, that the prosecutor told the court that this "was one of the People's theories, and then he's told the jury that it isn't." (Id. at 3118.) Based on the prosecutor's inconsistent positions, the defense urged the court to forego instructing the jury on this theory.

The court rejected the defense argument and gave the aiding-and-abetting instruction. However, the court incorrectly included aspects of the CALJIC

form aiding-and-abetting instruction that were irrelevant to the facts of the case (whether Petitioner withdrew from the criminal plot, and basing liability on the "natural and probable consequences" of his actions). (Id. at 3134-35.)

The jury convicted Petitioner of first degree murder. The jury was not given a special verdict form. As a result, there was no finding as to whether the jury convicted Petitioner on the theory that he directly committed the killing or aided and abetted the perpetrator.

B. The First Appellate Decision – Conviction Reversed

On direct appeal, the California Court of Appeal reversed Petitioner's conviction. (Lodgment # 6) (the "First Appellate Decision"). The appellate court concluded that there was no evidence that any person other than Petitioner participated in the murder. The court explicitly found that there was "no evidence that [Petitioner] discussed killing her with anyone or that he attempted to hire another to commit the murder." (Id. at 8-9.) The court further agreed with Petitioner that "the prosecutor proceeded solely on the theory [at trial that] defendant killed his wife." The First Appellate Decision concluded that the aiding-and-abetting instruction was unwarranted, and held that the trial court erred as a matter of state law by instructing the jury as to a theory of guilt "not supported by the evidence." (Id. at 10.)

The court further found this error to be prejudicial. The appellate court noted the sequence of the closing arguments, the notes that the jury sent out during deliberations, the evidence submitted in defense of the charge, and the substantive mistakes in the aiding-and-abetting instruction as relevant to its analysis of prejudice. The First Appellate Decision found prejudicial error because it would be "difficult to apply the general presumption" that the jury

understood and followed the instructions as a whole in this case. (Id. at 10-11.)

C. The Second Appellate Decision – Conviction Affirmed

The state sought review in the California Supreme Court. The supreme court vacated the appellate decision and remanded for reconsideration in light of People v. Guiton, 4 Cal. 4th 1116 (1993). On reconsideration, the Court of Appeal affirmed Petitioner's conviction. (Lodgment # 10) (the "Second Appellate Decision").

Guiton stands for the proposition that a criminal conviction must generally be reversed under state law when the jury is instructed on a "legally inadequate theory." People v. Green, 27 Cal. 3d 1 (1980). Reversal "is not required," though, simply because a jury is instructed on a "factually inadequate theory." Griffin v. United States, 502 U.S. 46 (1991). When there are "two possible grounds for the jury's verdict, one unreasonable and the other reasonable" – that is, supported by sufficient evidence – "we will assume, absent a contrary indication in the record, that the jury based its verdict on the reasonable ground." Guiton, 4 Cal. 4th at 1127.

On remand from the supreme court, the appellate court concluded that it could not determine whether Petitioner's jury convicted him "solely on the aiding and abetting theory" in violation of Guiton. (Lodgment # 10 at 8.) The court apparently maintained its conclusion from the First Appellate Decision that the aiding-and-abetting theory was not supported by the evidence. However, applying Guiton and Griffin, the court's Second Appellate Decision found no error because the jury was presented with a factually supported theory (Petitioner as direct assailant) and could have based its verdict on this ground. (Id. at 8-10.)

The Second Appellate Decision also found no due process violation from the prosecution's late reliance on the aiding-and-abetting theory. The court determined that the criminal information adequately notified Petitioner of the murder charge and the possibility of aiding-and-abetting liability. Moreover, "even if this case required greater specificity concerning the basis of defendant's liability, the evidence presented at his preliminary examination provided it." (Id. at 11 (emphasis added).) The Second Appellate Decision pointed to the investigator's summation of the informant's jailhouse discussion with Petitioner as presented at the preliminary hearing. The Court of Appeal determined that this testimony "meaningfully apprised [Petitioner] of the potential for an aiding and abetting theory" at trial. (Id. at 13.)

The court noted that the informant did not testify at trial. However, the Second Appellate Decision made no mention of the unique circumstances – the informant's refusal to testify, the interruption of the prosecution's opening statement, the extraordinary evidentiary hearing, the testimony of the informant's lawyers, and the delay in resuming the trial – by which the prosecution was unable to present evidence from the jailhouse informant. Additionally, the Second Appellate Decision did not refer to the trial court's express order to the parties at the beginning of the trial to avoid mentioning the informant's allegations. Nevertheless, the court held that the prosecution did not "ambush" defendant by requesting the aiding-and-abetting instruction at the close of trial and "did not deny defendant the notice guaranteed him under the Constitution." (Id. at 13-14 (quotations omitted).)

The state supreme court denied review. This federal habeas action followed.

III. DISCUSSION

A. Standard of Federal Court Review Under AEDPA

Petitioner's claims are subject to the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). Under AEDPA, federal courts may grant habeas relief to a state prisoner "with respect to any claim that was adjudicated on the merits in State court proceedings" only if that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

In a habeas action, this Court reviews the state courts' last reasoned decision. Maxwell v. Roe, 628 F.3d 486, 495 (9th Cir. 2010). Here, the California Court of Appeal's Second Appellate Decision affirming Petitioner's conviction (Lodgment # 10) stands as the last reasoned decision on Petitioner's claims. Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991).

In determining whether a state court decision was based on an "unreasonable determination of the facts" under 28 U.S.C. § 2254(d)(2), such a decision is not unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." Wood v. Allen, ___ U.S. ___, 130 S. Ct. 841, 849 (2010). The "unreasonable determination of the facts" standard may be met where "the state court has before it, yet apparently ignores, evidence that supports petitioner's claim." Ocampo v. Vail, 649

F.3d 1098, 1106 (9th Cir. 2011); Taylor v. Maddox, 366 F.3d 992, 1008 (9th Cir. 2004) (state court's "failure to take into account and reconcile key parts of the record casts doubt on the process by which the finding was reached, and hence on the correctness of the finding").

Overall, Section 2254(d) presents "a difficult to meet [ ] and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, ___ U.S. ___, 131 S. Ct. 1388, 1398 (2011) (quotations omitted). On habeas review, AEDPA places on Petitioner the burden to show that the state court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770, 786-87 (2011). Put another way, a state court determination that a claim lacks merit "precludes federal habeas relief so long as fairminded jurists could disagree" on the correctness of that ruling. Richter, 131 S. Ct. at 786 (quotations omitted).

B. Due Process Claim

1. Legal Standard [FN2]

[FN2] The Court notes that Respondent's brief in answer to the habeas petition (Docket # 9) was singularly unhelpful in setting forth the applicable law. The state's brief did not cite any relevant judicial opinions regarding the due process claim in the petition, and did not directly address Petitioner's argument. Indeed, Respondent's brief does not contain the word "notice" at all, which is fundamental to Petitioner's contention on habeas.

The district court is entitled to exercise its discretion to refuse to consider such an argument from the state if presented in this

> Court only in response to the Report and Recommendation. See, e.g., United States v. Howell, 231 F.3d 615, 621-23 (9th Cir. 2000) ("[A] district court has discretion, but is not required, to consider evidence presented for the first time in a party's objection to a magistrate judge's recommendation.").

The Sixth Amendment guarantees that a defendant be "informed of the nature and cause" of criminal charges to be presented at trial. U.S. Const., Amend. VI. It is clearly established federal law under the Constitution that a criminal defendant have "reasonable notice of a charge against him, and an opportunity to be heard in his defense." In re Oliver, 333 U.S. 257, 273 (1948); Cole v. Arkansas, 333 U.S. 196, 201(1948); Gautt v. Lewis, 489 F.3d 993, 1002 (9th Cir. 2007) (criminal defendant has fundamental right to notice of charges "to permit adequate preparation of a defense").

The starting point to determine whether a defendant had adequate notice of the criminal allegation is the charging document. Due process requires that the formal charge set forth the elements of the offense "with sufficient clarity to apprise a defendant of what he must be prepared to defend against." Givens v. Housewright, 786 F.2d 1378, 1380 (9th Cir. 1986) (information inadequate to inform defendant of special elements of murder charge).

In addition to the charging document, a defendant may be adequately informed of the nature of the charges by "a complaint, an arrest warrant, [ ] a bill of particulars[, or] during the course of a preliminary hearing." Sheppard v. Rees, 909 F.2d 1234, 1236 n.2 (9th Cir. 1989). Moreover, a defendant may receive "constitutionally adequate notice" of a theory regarding the commission of the charged crime "from the testimony" of witnesses during the trial. Morrison v. Estelle, 981 F.2d 425, 428 (9th Cir. 1992); Murtishaw v. Woodford, 255 F.3d. 926, 954

(9th Cir. 2001) (defendant's "actions at trial" in responding to prosecution evidence "suggest that he actually had notice of the felony murder theory"). Where the prosecution requests a jury instruction at the conclusion of a trial that conforms to evidence introduced during the case, due process is satisfied when the defense has sufficient time and notice to prepare for closing argument regarding the new theory of the case.[FN3] Stephens v. Borg, 59 F.3d 932, 935 (9th Cir. 1995).

> [FN3] Petitioner's reference to Lucas v. O'Dea, 179 F.3d 412 (6th Cir. 1999), addresses a different constitutional analysis not raised in the state court proceedings. The Lucas Court found that the prosecution's evidentiary presentation and requested jury instructions constituted a "variance from the indictment" and a "constructive amendment" of the charge against the defendant. Lucas, 179 F.3d at 417. However, in the present case, Petitioner neither cited to Lucas nor advanced a variance-from-charging-document argument in the state courts. (Lodgment # 3, 11 (appellant's briefs to state court of appeal and supreme court).) Accordingly, the Court will not take up this unexhausted argument on habeas review.

Under basic due process principles, "[t]he question is whether the accused was taken by surprise" by a change in trial tactics or circumstances. Gray v. Raines, 662 F.2d 569, 574 (9th Cir. 1981) (Tang, J., concurring). A defendant may not be convicted based on a charge or legal theory "that was neither subject to adversarial testing, nor defined in advance of the proceeding." Sheppard, 909 F.2d at 1237. Sheppard was a "narrow ruling" in which the state conceded that the prosecution "ambushed" the defendant with a new legal theory of which he had no notice before or during trial. Morrison, 981 F.3d at 428.

Even so, the Ninth Circuit has held that the late introduction at trial of a new legal theory or charge may be so fundamentally unfair as to merit habeas relief. In a recent decision affirming the grant of habeas relief, the court explained that a prosecutor cannot "induce[ ] and fail[ ] to correct a belief in the sufficiency of a particular defense strategy" by presenting a new theory of the case at end of trial. Lee v. Small, 419 Fed. Appx. 763, 765, 2011 WL 797332 (9th Cir. 2011). A reviewing court must determine whether it was "reasonable to conceive that [the defendant,] in investigating and preparing his defense, would have proceeded as he did if he had been charged with, or had known that he would be required to meet, a theory of prosecution not stated" in the information or advanced at trial. Id. (quoting Gray, 662 F.2d at 574).

Moreover, if the prosecution's evidence provides a "flimsy basis" for informing defendant of a change in legal theory, then the trial judge's closing jury instruction "cannot itself serve as the requisite notice of the charged conduct, coming as it does after the defendant has settled on a defense strategy and put on his evidence." Gautt, 489 F.3d at 1010-11. In Gautt, the charging document alleged a sentencing enhancement that required proof that the defendant personally used a firearm in the commission of an offense. However, the jury was instructed regarding an enhancement in the same statute that carried a more serious sentence for intentionally firing a firearm and causing great bodily injury in the crime. The prosecutor confusingly "disavowed" the need to prove the intentional aspect of the shooting and conflated aspects of the different enhancements in closing argument, and the jury returned a finding as to the more serious enhancement. Id. at 999-1000.

The Ninth Circuit concluded that Petitioner did not have notice of the chargeagainst him at trial. Given the government's presentation at trial and the lack of discussion of the more serious enhancement

until after the close of evidence, the court found "troublesome" the argument that:

> jury instructions or closing arguments – sure signs that the end of a trial is drawing near – could substitute for sufficient notice to a defendant of the charges that have been leveled against him. While an instruction may be informative in indicating the common understanding of the parties and the court as to what was at stake in the trial, it cannot itself serve as the requisite notice of the charged conduct, coming as it does after the defendant has settled on a defense strategy and put on his evidence.The same limitations are generally true of closing arguments as well. After all, if the purpose behind a defendant's constitutional right to notice is "to enable him to prepare his defense," [James v. Borg, 24 F.3d 20, 24 (9th Cir. 1994)], a rule that allows the state to satisfy this due process consideration via [ ] late-stage trial events can hardly advance that objective.

Gautt, 489 F.3d at 1010 (emphasis in original). The Gautt decision based this on the principle that the Constitution "speaks not of form, but of substance" in providing a defendant with notice of the criminal charge. Id. at 1009 (citing Sheppard and Gray).

A violation of the constitutional right to notice of the nature of a criminal charge is subject to harmless error analysis on habeas review. Id. at 1015-16 (declining to conclude that due process violation was structural error requiring automatic reversal); Lee, 419 Fed. Appx. at 766. Harmless error review requires a federal court to examine whether it believes that the error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). Reversal is required where "the record is so evenly balanced that a 'conscientious judge is in grave doubt

as to the harmlessness of an error.'" Gautt, 489 F.3d at 1016 (quoting O'Neal v. McAninch, 513 U.S. 432, 438 (1995)).

2. Analysis

a. Adequacy of Notice of Alternative Theory of Liability

Beginning with first principles, the Court agrees that Petitioner was adequately informed about the murder charge and the possibility of an aiding-andabetting argument before the trial began. The two-page information clearly charged Petitioner with the first degree murder of his wife, unmistakeably charging that, "in violation of Section 187(a) of the Penal Code (MURDER), a FELONY, MARVIN VERNIS SMITH did unlawfully and with malice aforethought kill MINNIE SMITH, a human being." (Lodgment # 1, 1CT at 103) (capitalization in original). The information also directly charged an enhancement that the murder was committed for financial gain.

California Penal Code Section 31 states that a person who aids and abets the commission of a crime may be punished as a principal for the crime. Such vicarious liability is implicit in the charging document and need not be pled with specificity before trial under state law. People v. Diaz, 3 Cal. 4th 495, 557 (1992); see also Carothers v. Rhay, 594 F.2d 225, 229 (9th Cir. 1979) (pleading that charges defendant as principal gives "adequate notice" of aiding-and-abetting charge). As a result, the Court concludes that Petitioner had adequate notice before the commencement of trial that he was charged with first degree murder – and that the prosecution could properly have pursued an aiding-and-abetting theory of liability against Petitioner for that murder at trial. See Givens, 786 F.2d at 1380.

Additionally, during pretrial proceedings, the defense was informed of evidence that potentially

could have supported such vicarious liability. The prosecution presented evidence that a jailhouse informant was prepared to testify against Petitioner. That testimony – Petitioner's alleged confession implicating himself in his wife's death – could plausibly have signified that the prosecution intended to prove that Petitioner aided and abetted another individual in killing Petitioner's wife. In the Second Appellate Decision, the court expressly concluded that the informant's anticipated statement "meaningfully apprised [Petitioner] of the potential for an aiding and abetting theory." (Lodgment # 10 at 13.) The Court accepts that the preliminary hearing testimony provided further notice to Petitioner that he might face an aiding-and-abetting liability argument at trial.[FN4] See Morrison, 981 F.2d at 428.

[FN4] Based on its independent review of the preliminary hearing transcript and the trial record, the Court has considerable doubt that the informant's testimony would have materially advanced the aiding-and-abetting hypothesis that the prosecution argued on appeal. The informant certainly would have presented sensational evidence that Petitioner admitted that he wanted to kill his wife for financial reasons. The jailhouse confession also would have advanced the prosecution's proof that Petitioner staged the phony burglary to mislead the police. Yet, the informant's brief statement as summarized in the detective's preliminary hearing testimony did not link Petitioner to another individual involved in the crime, nor did it necessarily even imply the existence of a second participant.

However, the state court's interpretation about the significance of the putative testimony is entitled to deference on habeas review. This federal court accepts the premise that the informant stood to be the prosecution's key – and sole – witness to

establish that Petitioner aided and abetted another in the killing of his wife.

The state appellate court therefore made two important factual findings regarding the trial in its decisions to which this Court defers. First, according to the Second Appellate Decision, the only evidence that the prosecution identified and could potentially have presented at trial regarding aiding-and-abetting liability was the anticipated testimony of the informant. (Lodgment # 10 at 13.) The Second Appellate Decision points to no other facts, testimony, or other proof supporting this legal theory. The Second Appellate Decision essentially labeled the informant's statement as the proxy through which the prosecution could have sought to establish Petitioner's culpability as an aider and abettor.

Second, the appellate court concluded that the prosecution actually presented no evidence at trial to support the aiding-and-abetting hypothesis. The Court of Appeal emphasized this lack of proof in several portions of its First Appellate Decision (Lodgment # 6 at 8, 9, 10), and did not back away from this conclusion in its second decision. Indeed, the reason that the Second Appellate Decision analyzed whether the trial court erred in giving the aiding-and-abetting instruction was because that theory was entirely unsupported by the evidence.

On habeas review under AEDPA, this Court defers to both state court factual conclusions: (1) the charging document and the informant's potential testimony as explained at the preliminary hearing served to give Petitioner notice of the aidingand-abetting theory before trial began; and (2) the prosecution presented no actual evidence (whether from the informant or any other source) to establish that Petitioner helped another person commit the homicide. A state court's factual findings are "presumed correct" on habeas review unless a prisoner is able to convincingly rebut them. Rice v. Collins, 546 U.S. 333, 339 (2006). Here, Petitioner

accepts both findings from the state appellate decisions without challenge.

b. Significance of Pretrial Ruling

The issue for this Court is whether Petitioner had adequate notice that he could be prosecuted for aiding and abetting the murder of his wife after his trial began. Although the defense had notice before trial began – from the contents of the charging document and the evidence at the preliminary hearing – the trial judge's order on the first day of trial abrogated that notice. Moreover, the way in which the trial was conducted and the lack of any evidence supporting the aiding- and-abetting hypothesis further confirmed that Petitioner was accused of actually killing his wife by himself. However, the appellate court analysis of Petitioner's due process claim unreasonably ignored the trial judge's order and the significant impact it had on the case. The Second Appellate Decision failed to acknowledge that the prosecution's theory of liability against Petitioner narrowed considerably after the preliminary hearing and the commencement of trial. In reality, Petitioner had no notice until the very end of the trial that the state intended to pursue an alternative theory of culpability against him.

It is apparent from the transcript that the trial judge affirmatively barred the prosecution from pursuing a key aspect of its case. On the day of opening statements, the court learned that the informant refused to testify against Petitioner at trial. The trial judge clearly recognized the significance of this unexpected twist. He temporarily excused the jury, conducted a remarkable evidentiary hearing at which the court heard sworn testimony from two public defenders, and delayed the parties' opening statements (including the prosecution's then-ongoing opening) for nearly two weeks.

Moreover, in a material, game-changing decision, the trial judge directly ordered both parties

to avoid referring to the informant at all. The trial judge certainly understood the strategic importance of the informant's refusal to testify, noting that the informant may have been a "big basket" into which the parties may have put their proverbial trial "eggs." (Lodgment # 2, 2RT at 424.) The trial judge therefore appropriately precluded the parties from addressing the issue with the jury at the beginning of trial.

The import of that ruling was that the prosecution's aiding-and-abetting theory – which, according to the Second Appellate Decision, was supported only by the informant's potential testimony – was firmly taken off the table. The parties and the court knew from the beginning of the case that the only evidence that could establish such liability was not likely to be presented at trial. Moreover, as the trial developed, the prosecution made clear that it did not intend to call the informant as a witness. As the appellate court correctly concluded, the jury never heard any testimony identifying or suggesting any participant in the crime other than Petitioner.

When the trial judge ruled on the informant issue, it was "reasonable to conceive" that Petitioner would defend the case on the only theory advanced by the prosecution and of which he had notice: whether Petitioner was the assailant who killed the victim. See Lee, 419 Fed. Appx. at 765. The prosecution confirmed that "common understanding" throughout the trial. See Gautt, 489 F.3d at 1010. The prosecutor directly accused Petitioner of striking the killing blow, vigorously disputed the medical evidence that the defense put forward to show that Petitioner was physically incapable of committing the attack, and attempted to dissect Petitioner's alibi for the day of the crime. Additionally, the prosecutor told the trial court toward the end of the government's case that the informant would not testify. The prosecution's actions during the trial assured Petitioner that he was accused of committing the murder directly, and not because he assisted anyone else. As a result, the

evidence that Petitioner presented in his defense and in questioning government witnesses only went toward refuting that allegation. See Murtishaw, 255 F.3d at 954 (analyzing defendant's "actions at trial" to evaluate whether he had notice of theory of government's case).

Petitioner was indisputably "taken by surprise" when the prosecution asked for an aiding-and-abetting instruction after the close of evidence. See Gray, 662 F.2d at 574. Such an instruction added new factual elements for the jury to find, [FN5] which in turn should have required that defendant had the opportunity to offer evidence in response. Here, however, the prosecution was allowed to pursue a new theory of the case – which was unsupported by any evidence – without giving Petitioner the substantive chance to present any witnesses or other proof in his defense. See Givens, 786 F.3d at 1381 (defendant entitled to "notice adequate to enable [him] to prepare a defense against the charge").

> [FN5] According to CALCRIM 401 as given to the jury at trial, the elements of aiding-and-abetting liability are: "1. The perpetrator committed the crime; 2. The defendant knew that the perpetrator intended to commit the crime; 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; and 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime." (Lodgment # 1, 4CT at 1155.)

As in Gautt, Petitioner surely "settled on a defense strategy" based on the court's pretrial ruling and the prosecution's evidentiary presentation. Gautt, 489 F.3d at 1010. The Ninth Circuit counsels courts to look at the substance (and not the form) of whatever notice the defendant received regarding the criminal charge. Id. at 1009. In the present case, the substance of the court ruling and the trial evidence

gave defendant notice that aiding-and-abetting liability was not going to be a part of the case as long as the informant refused to cooperate. As a result, Petitioner's attorney had no reason to cross-examine government witnesses about whether Petitioner encouraged or hired them to commit the murder, or to put on evidence that someone else killed the victim without Petitioner's involvement in the crime. Indeed, Petitioner's experienced trial lawyer would have been entitled to ask the prosecutor to identify who, in fact, Petitioner was accused of helping to commit the crime – yet she had no cause to do so until after the close of evidence. Whether Petitioner was "induced" into believing that aiding-and-abetting was out of the case based on the judge's order, the prosecution's case-in-chief, or both, the record supports his contention that he lacked notice of that theory during trial. See Lee, 419 Fed. Appx. at 765.

The Court concludes that it was eminently reasonable for the defense to believe that aiding-and-abetting liability would not be at issue in the case. Moreover, fair-minded jurists (including the state court of appeal when it issued the First Appellate Decision) would agree that a defendant is harmed when a court affirmatively precludes a theory of prosecution on the first day of trial, yet allows the prosecution to pursue that theory in rebuttal closing argument. See Richter, 131 S. Ct. at 786.

The Court recognizes the uniqueness of the circumstances in this case. Neither the parties' briefs nor the Court's own research identified a published decision in which a criminal defendant received notice of a theory of prosecution, had that notice withdrawn by operation of a court order, and then faced conviction on the theory after the close of evidence. And, while Gautt, Lee, and other cases overlap considerably with the events at Petitioner's trial, the Court acknowledges that the events in those cases are not identical to the case at bar.

What convinces the Court of the seriousness of the error here is that the state courts should have applied the basic due process principles – notice and the opportunity to present evidence in response to a criminal charge – enunciated in those federal decisions. AEDPA does not "prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts different from those of the case in which the principle was announced." Panetti v. Quarterman, 551 U.S. 930, 953 (2007) (quotation omitted). Clearly established federal law entitled Petitioner to notice of the charge against him and how the government intended to prosecute him. Whether he was denied this notice by the actions of an overreaching prosecutor or through reliance on a judge's order, the chain of events at Petitioner's trial failed to satisfy basic notions of due process at a criminal trial.

c. Factual Omission from Appellate Court Decision

The Court further concludes that the Second Appellate Decision was based on an unreasonable determination of the facts below. According to that decision, the prosecution (a) gave sufficient notice to the defense that it intended to pursue its aiding-and-abetting theory through the preliminary hearing statement attributed to the informant, but then (b) failed to present sufficient evidence to support the theory. Under that abbreviated recitation of the events, the Court of Appeal unfairly discounted Petitioner's contention that he did not expect to defend against the prosecution's aiding-and-abetting claim.

The Second Appellate Decision completely and unreasonably ignored the trial judge's ruling on the first day of trial. The notice that Petitioner received regarding the potential for aiding-and-abetting liability was clearly vitiated by the trial judge's decision. When the judge determined that the informant was not likely to testify, he ordered both

parties not to mention the informant – or, by extension, the aiding-and-abetting theory. Petitioner certainly abided by the court's ruling, and so did the prosecution for virtually all of the case. Nevertheless, the judge allowed the government to argue the barred, unsupported theory in closing argument.

The Court finds that the state appellate court unreasonably determined the facts of the case by failing to analyze the trial judge's pretrial preclusion order. The last minute aiding-and-abetting jury instruction represented a reversal of the trial judge's order from the first day of trial. The Second Appellate Decision did not consider or even mention that extraordinary event, though. That unfairly skewed the court's analysis of the defense claim to lack of notice. The Court further finds that the appellate court's failure to properly consider the impact of that order was material to Petitioner's due process claim.

Habeas relief is available where "the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim." Taylor, 366 F.3d at 1001. See also Blumberg v. Garcia, 687 F. Supp. 2d 1074, 1113 (C.D. Cal. 2010) (state court unreasonably ignored facts when evaluating whether prosecution used perjured testimony at trial); Saracoglu v. Walker, CV 09-2195 VAP (DMB), 2010 WL 1221764, at *11 (C.D. Cal. Jan. 27, 2010) (error to ignore testimony regarding whether out-of-court statement was testimonial hearsay); Roman v. Hedgpeth, ED CV 04-1226 JFW (FMO), 2008 WL 4553137, at *4 (C.D. Cal. Jun. 30, 2008) (appellate court ignored nature of defense and evidence as to jury misconduct claim). In the present case, the state appellate court plainly misstated the events at trial in a material way. That constitutes constitutional error underAEPDA.

d. Error Was Not Harmless

The Court further finds that the state appellate court's error was not harmless under Gautt or Brecht. Because the prosecution's new theory of liability was raised after the close of evidence, Petitioner could not offer evidence during the trial to refute the contention that he acted with another person to commit the crime. As mentioned above, Petitioner that he might have presented evidence of the lack of a criminal agreement between him and anyone else whom the prosecution alleged helped Petitioner kill his wife. (Docket # 14 at 24.) Petitioner was prevented from doing so, though, by the late assertion of the aiding-and-abetting theory. See Gautt, 489 F.3d at 1010.

More importantly, the Court agrees with Petitioner's contention – and the appellate court's first conclusion – that the proof of Petitioner's guilt was too close to have overriding confidence in the verdict. This was a closely-fought trial with dueling experts, conflicting percipient witnesses, and fierce disagreement over the basic facts of the case. Notably, there was no "home run" evidence – a confession, an eyewitness, a piece of indisputable forensic evidence – that conclusively linked Petitioner to the crime. Rather, the prosecution relied on the cumulative circumstantial evidence and the overall plausibility of its theory of the case, while the defense emphasized Petitioner's alibi for the time of the crime and his physical inability to strike the killing blow.

The prosecutor himself commented on the thinness of the evidence during closing argument. The prosecutor encouraged the jury to convict Petitioner either of committing the crime directly or by aiding and abetting another – "half of you can think it was one way and the other half think it's the other way, doesn't matter[.] I could care less which one you believe." (Lodgment # 2, 16 RT at 3112.) The prosecutor apparently conceded that the evidence of

guilt was not overwhelming under either theory. Additionally, the Court concurs with the appellate court's first decision in which it concluded that the trial judge gave an incorrect version of the aiding-and-abetting liability instruction. Far from helping the jury analyze the evidence of Petitioner's guilt, the trial judge's instruction may well have confused the jury regarding how it was to consider the case.

Given the close nature of the evidence, the Court has real doubts about the validity of the jury's verdict here. Petitioner may well have killed his wife. He may also have hired someone to help him commit the murder. If the prosecution possessed admissible evidence supporting both theories, the law would have allowed the government to pursue both at trial. However, as the trial developed, the prosecution had no evidence to support the aiding-and-abetting theory, and the trial judge ordered both sides to avoid the area entirely. The trial judge unexpectedly allowed the prosecutor to argue a new theory for the first time at the end of a close trial. The Court finds that this violated due process, and that the state appellate court's analysis ignored material facts regarding the trial. For these reasons, the Court recommends that habeas relief be granted.

C. Additional Jury Instruction Claim

The federal habeas petition asserts a single claim of constitutional error – the late decision to instruct the jury regarding the aiding-and-abetting theory. (Docket # 1 at ¶ 7.) However, in his supporting memorandum, Petitioner offers an additional argument against his conviction by challenging the text of the aidingand-abetting instruction.

Assuming that Petitioner pled a separate habeas claim regarding the substance of the jury instruction, the Court concludes that Petitioner is not entitled to relief on that contention. A jury instruction that relieves the prosecution of its burden

of proving every element of a charged offense violates a defendant's due process rights. Carella v. California, 491 U.S. 263, 265 (1989). However, to merit relief when an allegedly erroneous jury instruction is given, petitioner must show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violated due process." Estelle v. McGuire, 502 U.S. 62, 72 (1991); Dunckhurst v. Deeds,[1] 859 F.2d 110, 114 (9th Cir. 1988). To the extent that a habeas petitioner complains that an instruction is not an accurate statement of state law, the state court's decision on direct appeal constitutes a binding interpretation of that state law. Bradshaw v. Richey, 546 U.S. 74, 76 (2005); Souch v. Schaivo, 289 F.3d 616, 621 (9th Cir. 2002). Where a jury instruction error allegedly occurred, the claim is reviewed under the Brecht harmless error standard.

Petitioner argues that the trial judge "mangled" the aiding-and-abetting instruction by including bracketed, optional text from a form instruction that was not relevant to the facts of the case. The Court agrees (as set forth above) that there was a fundamental error in instructing the jury about the concept of aiding- and-abetting culpability at the end of the trial. However, Petitioner sees additional nuances of error in the specific instruction that are far from apparent. When read in the context of the entire set of jury instructions, the Court finds that the extra text read to the jury in the challenged instruction did not itself infect the trial in a manner that violated due process. In its analysis, the state appellate court reasonably reviewed the instruction under state law and properly conducted a harmless error analysis. Habeas relief is not warranted on Petitioner's alternate claim.

IV. RECOMMENDATION

When the prosecution first requested an aiding-and-abetting instruction, it was after the close of evidence at a trial in which proof of a second

criminal participant was absent and had specifically been barred by the trial judge. The trial court should not have given the instruction as a matter of fact (lack of evidence) and as a matter of law (its pretrial ruling). The state appellate court failed to adequately consider this in analyzing whether there was a due process violation. In the context of a close case with conflicting, circumstantial evidence, the constitutional error cannot be considered harmless.

IT IS RECOMMENDED that the District Court issue an Order:

(1) accepting the findings in this Report; and (2) directing that judgment be entered granting the petition and that an order be issued directing Respondent to release petitioner unless the State of California elects to retry Petitioner for murder within 90 days from the filing of the order.

DATED: February 28, 2012

MICHAEL R. WILNER
UNITED STATES MAGISTRATE JUDGE

FILED March 9, 2010

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,
Plaintiff and Respondent,
v.
MARVIN VERNIS SMITH,
Defendant and Appellant

No. G040107.

(Super. Ct. No. 07CF1791)

OPINION

Appeal from a judgment of the Superior Court of Orange County,
Dan McNerney, Judge. Reversed.

Riordan & Horgan, Dennis P. Riordan, Donald M. Horgan and Benjamin Owens for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Robin Derman, Deputy Attorneys General, for Plaintiff and Respondent.

The trial court sentenced defendant Marvin Vernis Smith to 25 years to life in prison after a jury convicted him of first degree murder for the death of his wife Minnie Smith. On appeal, defendant asserts several claims of evidentiary and instructional error. We agree the evidence failed to support the trial court's decision to instruct the jury on aider and abettor liability and that it prejudicially erred in doing so. Therefore, we reverse the judgment.

FACTS

Shortly after 6:30p.m. on December, 15, 2005, police officers went to the home of defendant and his wife in response to defendant's 911 call reporting he believed an intruder was in the residence. After entering the house, the police found Smith on the floor of the upstairs master bedroom dead from blunt force injuries to her head. Subsequent investigation determined the fatal blows came from a log roller kept next to the downstairs fireplace. The victim was lying face down, wearing a nightshirt covering only the upper part of her body with her hands and arms bound behind her back by a wire coat hanger tied around the wrists. One foot missing a sock had bum marks. Investigators found matches, charred material, and pieces of duct tape near the body.

The police also found evidence of a break-in. A kitchen window was open with the outer screen removed. Just inside the window, a vase lay on its side on the floor. Drawers were open in several rooms throughout the house. In the master bedroom closet, a portion of the carpeting had been pulled back disclosing a floor safe with the lid open and no valuables inside of it.

When questioned later that evening about valuables kept in the home, defendant specifically mentioned a diamond encrusted gold medallion, a diamond encrusted Cadillac emblem, and a diamond ring he kept in the master bedroom armoire.

Defendant participated with the police in a videotaped walk-through of the house one week later. Before the walk-through, the police replaced the lid to the floor safe and covered it with the carpet. The aforementioned jewelry items plus a bottle of liquor were the only things defendant identified as missing. Defendant claimed the safe should contain his wife's jewelry and $30,000 in cash. The police arrested him the next day after discovering bags with the missing jewelry, Smith's social security card, and her other valuables in the trunk of his car inside plastic bags wrapped with duct tape.

The prosecution theorized that defendant killed his wife on the morning of December 15 and then staged the home to appear as if it had been burglarized. In addition to discovering Smith's body next to an unmade bed dressed only in a nightshirt with a matching nightcap underneath her head, an autopsy revealed she had no food in her stomach. A police officer who saw the body the evening of December 15, observed dried streaks of blood ran on the victim's face and dried blood on the carpet under her head. Bennie Thomas, Smith's son, testified he called his mother around 9:00a.m. on December 15, but she did not answer the phone and, contrary to her usual habit, did not return his call within an hour.

The pathologist who examined Smith's body testified to the absence of bruising on her wrists indicated the wire hanger used to bind the hands and arms had been affixed at or about the time of her death and that she had not struggled with her attacker. An investigator who examined the body at the home the day after the murder opined Smith died sometime between 5:30a.m. and 5:30p.m. on December 15.

The duct tape found near Smith's body came from the same roll of tape used on the bags containing the jewelry found in defendant's car and found in the garage of the residence. Forensic testing

found defendant's DNA profile on the log roller below the handle, one of the burned matchsticks, and the duct tape next to the victim's body, plus the duct tape used to wrap the jewelry found in his car.

A neighbor's tool box was discovered adjacent to the wall separating that yard from the Smith's residence, but a police officer noted there was no disturbance of any dust or debris that would suggest a person had stood on the tool box or climbed over the wall. Nor was there any evidence someone had traversed the yard between the block wall and kitchen window. There were no foot prints in the planter below the window and the screen removed from it had been placed where it would have been in the way if a burglar attempted to leave the residence by that route. Nor was there any scuffing on the window sill. The ceramic vase lying on the floor below the window was not damaged. The drawers removed from furniture had been neatly stacked and the contents of some drawers did not appear to have been disturbed. Although the master bathroom was ransacked, the police found a gun, an item considered to have "a high street value," in one of the drawers. A second six-foot tall safe located in the garage that contained several guns and a twelve-inch high stack of $2 bills was left undisturbed as were wrapped Christmas gifts kept in a downstairs bedroom.

Defendant made inconsistent statements. During the 911 call and when questioned by the police later that evening, he claimed to have entered the house through the front door. Thomas testified defendant's practice was to enter the house through the garage where the police found Smith's car. Defendant told the police he believed his wife was not home, in part because the front sunshade screen, which she usually kept in the up position, was down. He also claimed he could not find the switch to raise the sunshade screen. The police officers who responded to defendant's 911 call testified the screen was up when they arrived. One of the officers participating in the crime scene investigation

testified the sunshade screen switch glowed in the dark. When questioned by the police on December 15, defendant said he and his wife never locked the floor safe in the master bedroom closet. During the walk through one week later defendant claimed his wife kept the floor safe locked and denied he knew the combination to it.

The prosecution also presented evidence that during the marriage defendant and his wife had fights and defendant engaged in extramarital affairs with other women. Samuel Matthews, who had worked at a liquor store owned by defendant, testified defendant "would ... say he wish[ed] it was just him and his dog or just him by himself." On another occasion, defendant told Matthews "the only way to get out of the marriage [was] they had to die," because he was "not going to give Minnie half of what I got so another man can live off of it."

The defense claimed defendant was not present when the murder occurred and could not have committed it himself. He presented evidence disputing the prosecution's claims concerning the time of death, the staging of a burglary, and the state of the marriage. The defense also presented evidence detailing defendant's whereabouts on December 15, and that he had undergone rotator cuff surgery on his left shoulder in early November 2005 and would not have been able to strike the fatal blows.

Two witnesses testified to seeing a white vehicle in the Smith's driveway on the afternoon of December 15. Ada Moses, defendant's ex-wife, testified she saw the jewelry found in defendant's car several months before the murder when she placed some gardening tools in the trunk in preparation for visit of their daughter's grave. In addition, defendant presented evidence suggesting Matthews may have killed Smith. Matthews purportedly owed defendant a substantial amount of money. He knew defendant had safes in the house and was aware of some details about the crime.

DISCUSSION

1. Introduction

During opening statement, the prosecutor asserted defendant "murdered his wife ... and then he staged the crime scene to make it look like a burglary ... to avoid detection.",After the close of evidence, he asked the court instruct the jury on aider and abettor liability. "The jury doesn't have to necessarily believe, and I think defense counsel will argue that the defendant did not or could not have committed the crime himself. But that doesn't mean that if he didn't commit the crime himself, that if they find that he aided and abetted in the crime that he's still not guilty of the crime. [¶] So if he didn't swing the murder weapon, it doesn't mean he's not guilty of the crime."

Over defense counsel's objection, the trial court agreed to instruct the jury using CALCRIM Nos. 400 and 401. Noting the "considerable evidence ... from both sides regarding the issue of whether or not [defendant] had the ability to use this particular object in a particular manner to inflict the blow that resulted in Mrs. Smith's death" and "with respect to circumstances that point to [defendant] having been involved," the court ruled "the instruction[s] should be given, based on the current state of the evidence so that the jury's not left ... without guidance from the court as to what do we do ... [¶] [i]f we determine that [defendant] was involved in this, but he's not the person who actually hit Mrs. Smith with that fireplace tool .... "

2. Sufficiency of the Evidence Supporting an Aiding and Abetting Theory

Defendant challenged use of an aiding and abetting theory, in part, arguing the evidence did not support this theory because "liability may not be predicated on a defendant's aiding of an unknown

principal, 'created from the whole cloth of pure speculation.' [Citation.]" Respondent claims that "as the trial court noted, there was evidence, primarily advanced by the defense, that someone other than [defendant] wielded the fireplace tool," but, given the prosecution's evidence of his involvement, "[e]ven if the jury accepted the defense theory on this point, it could nonetheless have concluded that [defendant] accomplished the murder with the assistance of another." Defendant has the better argument.

"'The test for determining whether instructions on a particular theory of guilt are appropriate is whether there is substantial evidence which would support conviction on that theory. [Citation.] To determine whether there is substantial evidence to support a conviction we must view the record in a light most favorable to conviction, resolving all conflicts in the evidence and drawing all reasonable inferences in support of conviction. We may conclude that there is no substantial evidence in support of conviction only if it can be said that on the evidence presented no reasonable fact finder could find the defendant guilty on the theory presented. [Citation.]' [Citations.]" *(People v. Campbell* (1994) 25 Cal.App.4th 402, 408.)

Under Penal Code section 31, "All persons concerned in the commission of a crime, ... whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, ... are principals in any crime so committed," and therefore one "who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts. [Citation.]" *(People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) But "for a defendant to be found guilty under an aiding and abetting theory, someone other than the defendant must be proven to have attempted or committed a crime; i.e., absent proof of a predicate offense, conviction on an aiding and abetting theory cannot be sustained." *(People v. Perez* (2005) 35

Cal.4th 1219, 1225.) "Without proof of a criminal act by [a perpetrator] to which [the defendant] contributed, the prosecution could not convict [the defendant] as an aider and abettor. [Citations.]" *(Id.* at p. 1227.)

In *People v. Singleton* (1987) 196 Cal.App.3d 488, after stopping a car in which the defendant was riding as a passenger, the police found numerous bindles of cocaine in one of her boots. Charged with possessing cocaine for sale, the defendant claimed the driver gave her the bindles and asked her to hide them for him. The trial court instructed the jury on an aiding and abetting liability theory because the prosecutor contended she could be found guilty if she assisted someone, other than the driver, sell the cocaine.

The Court of Appeal reversed. "[W]e can fmd no evidentiary foundation for accomplice liability hinged solely upon the prosecution's theory that [the] defendant aided and abetted an anonymous 'Mr. X.' In cases which have upheld accomplice liability in narcotics transactions, there has always been evidence of a principal whom the defendant in some way knowingly assisted in the accomplishment of a criminal objective. [Citations.] We have found no case, however, and none has been cited to us, where guilt of aiding and abetting has been upheld despite the total absence of any proof of a perpetrator. We cannot accept the notion that a defendant's conviction can rest solely on a theory of aiding, promoting, encouraging, or instigating a principal created from the whole cloth of pure speculation." *(People v. Singleton, supra,* 196 Cal.App.3d at p. 493.)

The prosecution's evidence supported a conclusion defendant killed Smith. His DNA profile was found on the murder weapon and artifacts found around her body. He made inconsistent statements to the police. The evidence suggested the purported burglary had been staged. The duct tape found near Smith's body also contained defendant's DNA profile

and came from the same roll used to wrap up the valuables discovered in defendant's car that he claimed were "missing" after the burglary.

On the other hand, defendant presented testimony the murder occurred after he left for work on December 15 and that he did not return home that day until shortly before making the 911 call. In addition, the defense presented evidence defendant's recent rotator cuff surgery rendered it impossible for him to swing the log roller with sufficient force to kill his wife as claimed by the prosecution. Thus, while there was evidence that Smith was murdered, other than by defendant, no proof was presented that another person participated in accomplishing this criminal enterprise.

Respondent relies on *People v. Staten* (2000) 24 Cal. 4th 434 to support the use of aiding and abetting instructions in this case. There the defendant was charged with and convicted of murdering his parents. At trial, over a defense objection, the trial court gave aiding and abetting instruction noting, "'the People's theory is that the defendant was involved; that they have no direct evidence that he was the perpetrator, even though that's also their theory, that (A) he was the perpetrator; (B), if he wasn't, he's an aider and abettor.'" *(Id.* at p. 457.)

The Supreme Court affirmed the conviction, rejecting the defendant's claim the trial court erred by giving aiding and abetting instructions because "no evidence was presented from which the jurors could reasonably infer that he had arranged with an accomplice to murder his parents." *(People v. Staten, supra,* 24 Cal. 4th at p. 458.) "There was sufficient basis for the jury to find from the evidence that defendant could have been guilty as an aider and abettor: he had discussed the idea of killing his parents with friends, and the lack of forcible entry on the night of the murders suggested that he either committed the killings himself or left the house unlocked for the actual killers. His defense that he

was not at home at the time of the killings and that one person could not have committed both murders was not inconsistent with a theory of aiding and abetting. If the jury had accepted his evidence on that point, it could nonetheless reasonably have concluded that he accomplished the murders with the aid of others." *(Id.* at pp. 458-459, fn. omitted.)

Here, unlike *Staten,* the prosecutor proceeded solely on the theory defendant killed his wife. The request for instruction on aiding and abetting came after the close of evidence because he was concerned the strength of the defense evidence might engender a reasonable doubt as to this theory in the minds of some jurors. Also, in finding the evidence sufficient to support an aiding and abetting instruction, *Staten* noted the defendant "had discussed the idea of killing his parents with friends .... " *(People v. Staten, supra,* 24 Cal. 4th at p. 458.) Other than Matthews's testimony that at some point in the past defendant had made general comments about his desire to live alone and that he would never divorce his wife, we have no evidence defendant discussed killing her with anyone or that he attempted to hire another to commit the murder.

An instruction on aiding and abetting as an alternative theory of liability is not justified merely because a defendant presents an arguably successful defense concerning his identity as the perpetrator of a crime. Thus, we conclude the evidence failed to support the giving of aiding and abetting instructions in this case.

3. Prejudice

The remaining question is whether the giving aiding and abetting instructions in this case constituted prejudicial error. We think so.

The error committed involved instructing the jury on a theory not supported by the evidence. Thus, it constituted "state law error[]" *(People v. Perez,*

supra, 35 Cal. 4th at p. 1232), and an appellate court generally "must assess the entire record, 'including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict[]' [citation]," and "affirm 'unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory.' [Citation.]" *(Id.* at p. 1233; see also *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The prosecution tried this case on a theory defendant killed his wife and staged it to look like a burglar had broken into the house and killed Smith when she confronted him. In response, the defense presented evidence suggesting defendant had left for work before she was killed and that his recent surgery precluded him from striking the fatal blows in any event. Only after the close of evidence did the prosecutor, concerned about the strength of the defense evidence, ask for an instruction on aiding and abetting as an alternate theory ofliability. While the prosecutor declared aiding and abetting was "not [his] theory," he acknowledged some jurors might believe defendant was "in on [the crime], but ... not sure that he could have wielded the weapon."

During their nearly five hours of deliberations, the jurors sent out a request for some trial materials including the log roller and "medical records from [the] surgeon & physical therapist .... " This request suggests the jurors focused on whether defendant had the physical strength to beat his wife to death.

Finally, the error in giving the aiding and abetting instructions was exacerbated by the court's reading of portions of the standard instructions applicable only to the natural and probable consequences doctrine and withdrawal of one who aids and abets a crime. When a trial court erroneously instructs the jury, "'the question we ask is whether there is a reasonable likelihood that the

jury construed or applied the challenged instruction[s] in an objectionable fashion.' [Citation.]" *(People v. Osband* (1996) 13 Cal.4th 622, 679.) But where, as here, the instructions on aiding and abetting were not only unsupported by the evidence, but also referred to entirely inapplicable legal principles, it is difficult to apply the general presumption that "jurors ... understand and faithfully follow instructions.' [Citation.]" *(People v. Smith* (2007) 40 Cal .4th 483, 517-518.)

Under these circumstances, we conclude the trial court committed prejudicial error by instructing the jury on aiding and abetting as an alternate theory of
liability in this case.

DISPOSITION

The judgment is reversed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

IKOLA, J.

FILED June 23, 2010

S181911

IN THE SUPREME COURT OF CALIFORNIA
En Banc

COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,
Plaintiff and Respondent,
v.
MARVIN VERNIS SMITH,
Defendant and Appellant

No. G040107.

The petition for review is granted.

The above-entitled matter is transferred to the Court of Appeal, Fourth Appellate District, Division Three, with directions to vacate its decision and to reconsider the cause in light of *People v. Guiton* (1993) 4 Cal. 4th 1116. (Cal. Rules of Court, rule 8.528(d).)

George

Chief Justice

Kennard

Associate Justice

Baxter

Associate Justice

Werdegar

Associate Justice

Chin

Associate Justice

Moreno

Associate Justice

Corrigan

Associate Justice

FILED December 8, 2010

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,
Plaintiff and Respondent,
v.
MARVIN VERNIS SMITH,
Defendant and Appellant

No. G040107.

(Super. Ct. No. 07CF1791)

OPINION

Appeal from a judgment of the Superior Court of Orange County,
Dan McNerney, Judge. Affirmed.

Riordan & Horgan, Dennis P. Riordan and Donald M. Horgan for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Robin Derman, Deputy Attorneys General, for Plaintiff and Respondent.

The trial court sentenced defendant Marvin Vernis Smith to 25 years to life in prison after a jury convicted him of first degree murder in the death of his wife Minnie Smith (Smith). Defendant appealed asserting several evidentiary and instructional errors.

In a prior opinion we reversed the conviction, finding insufficient evidence to support the trial court's instruction of the jury on aider and abettor liability. The Attorney General petitioned for review and the California Supreme Court granted it, remanding the matter to this court with directions to vacate our prior decision and reconsider the cause in light of *People v. Guiton* (I993) 4 Ca1.4th 1116. *(People v. Smith,* review granted June 23, 20 I 0, S 181911.)

Having reconsidered the case as directed by the Supreme Court, we now conclude the instruction on aider and abettor liability did not constitute prejudicial error and defendant's remaining claims lack merit. Thus, we affirm the judgment.

FACTS

Shortly after 6:30p.m. on December 15, 2005, police officers went to the Smith's residence in response to defendant's 911 call reporting that he believed an intruder was in the home. After entering the house, the police found Smith on the floor of the upstairs master bedroom next to an unmade bed dead from blunt force injuries to her head. The victim was lying face down, wearing a nightshirt covering only the upper part of her body with her hands bound behind her back by a wire coat hanger tied around the wrists. One foot missing a sock had burn marks. Investigators found matches, charred material, and pieces of duct tape near the body. Subsequent investigation determined the fatal blows came from a log roller stored next to the downstairs frreplace.

The police also found a kitchen window open with its screen removed. Just inside the window, a vase lay on its side on the floor. Drawers were open in several rooms throughout the house. In the master bedroom closet, a portion of the carpeting had been pulled back disclosing a floor safe with the lid open and no valuables inside of it.

When questioned later that evening about valuables kept in the home, defendant specifically mentioned a diamond encrusted gold medallion, a diamond encrusted Cadillac emblem, and a diamond ring he kept in the master bedroom armoire. A week later, defendant participated in a videotaped walk through of the house with investigators. Before the walk-through, the police closed the floor safe's lid and replaced the carpet covering it. The aforementioned jewelry items plus a bottle of liquor were the only items defendant identified as missing.

During the week following Smith's murder, an undercover officer saw defendant at a construction site using a six-foot long 2-by-4 board in an apparent effort to pry something sticking out of a concrete slab. The officer testified defendant held the board with his right hand above the shoulder and the left hand several inches farther down and alternately pushed and pulled the board for two to three minutes. The police arrested defendant after discovering the missing jewelry, Smith's social security card, and her other valuables in the trunk of his car inside plastic bags wrapped with duct tape.

The prosecution theorized defendant killed his wife on the morning of December 15 and staged the home to appear as if it had been burglarized. In addition to the location and condition of Smith's body, an autopsy revealed she had no food in her stomach. A police officer who saw the body the evening of December 15 observed dried streaks of blood on the victim's face and dried blood on the carpet under her head Bennie Thomas, Smith's son, testified he tried to call his mother the morning of

December 15. Contrary to her usual habit, she did not answer the phone or promptly return his call.

The pathologist who examined Smith's body testified the absence of bruising on her wrists indicated the wire hanger used to bind the hands had been affixed at or about the time of her death and that she had not struggled with her attacker. An investigator who examined the body at the home early in the morning of December 16 opined Smith died sometime between 5:30a.m. and 5:30p.m. on December 15.

The duct tape found near Smith's body came from a roll found in the garage of the residence that was also used to wrap the bags containing the jewelry discovered in defendant's car. Forensic testing found defendant's DNA profile on samples taken from the log roller, one of the burned matchsticks, and the duct tape next to the victim's body, plus the duct tape used to wrap the jewelry found in his car.

The police discovered a neighbor's tool box adjacent to the wall separating the neighbor's yard from the Smiths' residence, but an officer noted there was no disturbance of any dust or debris that would suggest a person had stood on the tool box or climbed over the wall. Nor could the officer fmd any indication someone had traversed the yard from the block wall to the kitchen window. The police did not observe foot prints in the planter outside the kitchen window and the screen removed from it was resting where it would have been in the way if a burglar attempted to leave the residence by that route. There was no scuffmg on the window sill. The ceramic vase lying on the floor below the window was not damaged.

The drawers removed from furniture had been neatly stacked and the contents of some drawers did not appear to have been disturbed. Although the master bathroom was ransacked, the police found a

gun, an item considered to have "a high street value," in one of the drawers; Neither a second 6-foot tall safe located in the garage that contained both several guns and a 12-inch high stack of $2 bills, nor wrapped Christmas gifts kept in a downstairs bedroom had been disturbed.

Defendant made inconsistent statements. He told the police he entered the house through the front door and believed his wife was not home, in part, because the front sunshade screen, which she usually kept in the up position, was down. Thomas testified defendant's practice was to enter the house through the garage where the police found Smith's car. The police officers dispatched to the home in response to the 911 call testified the screen was up when they arrived. Defendant also claimed he could not find the switch to raise the sunshade screen. One officer participating in the crime scene investigation testified the sunshade screen switch glowed in the dark. When questioned by the police on the night of December 15, defendant said he and his wife never locked the floor safe in the master bedroom closet. During the subsequent walk-through defendant claimed his wife kept the floor safe locked and denied he knew the combination to it.

The prosecution also presented evidence defendant and his wife fought during their marriage and defendant had engaged in extramarital affairs with other women. Samuel Matthews, who once worked at a liquor store owned by defendant, testified defendant "would ... say he wish[ed] it was just him and his dog or just him by himself." On another occasion, defendant purportedly told Matthews "the only way to get out of the marriage [was] they had to die," because he was "not going to give Minnie half of what I got so another man can live off of it."

The defense claimed defendant was not present when the murder occurred and could not have committed it himself. It also disputed the

prosecution's claims concerning the time of death, the staging of the alleged burglary, and state of the couple's marriage. The defense presented detailed evidence concerning defendant's whereabouts on December 15. Two defense witnesses testified to seeing a white vehicle parked in the Smith's driveway on the afternoon of December 15. Ada Moses, defendant's ex-wife, testified she saw the jewelry found in his ear several months before the murder when she placed some gardening tools in the trunk in preparation for a visit to their daughter's grave. Furthermore, the defense questioned defendant's ability to strike the fatal blows, introducing evidence he had undergone rotator cuff surgery on his left shoulder in early November 2005. Finally, it suggested Matthews may have killed Smith. Matthews purportedly owed defendant a substantial amount of money. He knew defendant had safes in the house and was aware of some details about the crime.

DISCUSSION

I. The Aider and Abettor Liability Claims

a. Introduction

During opening statement, the prosecutor asserted defendant "murdered his wife ... and then he staged the crime scene to make it look like a burglary ... to avoid detection." But during a discussion on jury instructions after the close of evidence, the prosecutor asked the court to instruct the jury on aider and abettor liability. "The jury doesn't have to necessarily believe, and I think defense counsel will argue that the defendant did not or could not have committed the crime himself. But that doesn't mean that if he didn't commit the crime himself, that if they find that he aided and abetted in the crime that he's still not guilty of the crime. [¶] So if he didn't swing the murder weapon, it doesn't mean he's not guilty of the crime." Over defense counsel's objection, the trial court agreed to give CALCRIM Nos. 400

["Aiding and Abetting: General Principles"] and 40 I ["Aiding and Abetting: Intended Crimes"]. Defendant challenges use of the aiding and abetting theory on several grounds.

b. The Aiding and Abetting Liability Instructional Error

First, defendant claims the evidence failed to support an aider and abettor theory of liability. In our previous opinion, we agreed with this argument and reversed his conviction, finding this error prejudicial. *(People v. Perez* (2005) 35 Cal. 4th 1219, 1233; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The Supreme Court granted review and transferred the matter to us for reconsideration in light of its decision in *People v. Guiton, supra,* 4 Cal. 4th 1116. There a police officer conducting narcotics surveillance saw the defendant hand a confederate something and, after engaging in a transaction with a third person, the confederate handed something to the defendant. When police officers later stopped a vehicle occupied by the defendant and his confederate, they discovered a bag containing cocaine near the defendant's feet. The prosecution charged the defendant with violating a statute that made it a crime to either sell or transport cocaine and, at trial, the jury was instructed on both theories of guilt. The Court of Appeal reversed the defendant's conviction. While it agreed the evidence supported a finding the defendant transported cocaine, the court found the evidence failed to support a conclusion he sold cocaine and it could not determine on which theory the jury based its verdict.

The Supreme Court granted review and reversed the Court of Appeal. After discussing and harmonizing its prior decision in *People v. Green* (1980) 27 Cal. 3d 1, disapproved on another ground in *People v. Martinez* (1999) 20 Cal. 4th 225, 239, with *Griffin v. United States* (1991) 502 U.S. 46 [112 S.Ct. 466, 116 L.Ed.2d 371], the court stated the rule

as follows: "If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground. But if the inadequacy is legal, not merely factual, ... the ... rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground." *(People v. Guiton, supra,* 4 Cal.4th at p. 1129, fn. omitted.)

As for "determining whether there was prejudice" when a trial court instructs on a factually unsupported theory of conviction, the court "adopt[ed] the following test. ... [T]he appellate court should affirm the judgment unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." *(People v. Guiton, supra,* 4 Cal.4th at p. 1130.) In applying this standard, the court explained "the entire record should be examined, including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict. [Citation.] Furthermore, instruction on an unsupported theory is prejudicial only if that theory became the sole basis of the verdict of guilt; if the jury based its verdict on the valid ground, or on both the valid and the invalid ground, there would be no prejudice,_[or there would be a valid basis for the verdict." *(Ibid.)*

Applying *Guiton's* principles here, we conclude the record does not affirmatively indicate the jury based its guilty verdict solely on the aider and abettor theory. The parties presented conflicting evidence on whether defendant was present when his wife was murdered and whether he had the physical ability to strike the fatal blows himself. Although requesting an instruction on aiding and abetting liability, the prosecutor disavowed reliance on it as a basis for conviction. He failed to assert it during closing argument and when mentioning it during

rebuttal declared, "Is it my theory? Heck, no, it's not my theory. That's not what I think happened." Defense counsel also discounted the existence of an aider and abettor, describing it as "a new theory in this case" about "a phantom second guy. And [defendant] is going to be with that phantom second guy. And that second guy is going to be doing the killing and the lifting and whatnot, even though the prosecution's DNA experts say there's no foreign DNA found in the house."

During their nearly five hours of deliberations, the jurors sent out a request for some trial materials, including the log roller and "medical records from [the] surgeon & physical therapist .... " Agreeing with the United States Supreme Court's observation that "jurors *are* well equipped to analyze the evidence [citation]" *(Griffin V. United States, supra,* 502 U.S. at p. 59), *Guiton* concluded, ""The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.' [Citation.] Thus, if there are two possible grounds for the jury's verdict, one unreasonable and the other reasonable, we will assume, absent a contrary indication in the record, that the jury based its verdict on the reasonable ground." *(People v. Guiton, supra,* 4 Cal.4th at p. 1127.) These requests indicate the jury focused on whether defendant had the physical strength to beat his wife to death. There is no suggestion it focused on only the aider and abettor theory in this case.

Finally, although the trial court read superfluous portions of CALCRIM Nos. 400 and 401 to the jury, as discussed at greater length below, the extraneous material likely had no effect on its deliberations. Under these circumstances, the trial court's error in giving aiding and abetting instructions did not constitute prejudicial error.

c. *Prosecutorial Misconduct*

Defendant also argues the prosecutor's delay in asserting the aiding and abetting theory until after the close of evidence and waiting until his rebuttal argument to argue it constituted prosecutorial misconduct.

Initially, we note defendant has waived these claims by failing to timely assert them. "'A defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety.' [Citation.]" *(People v. Lopez* (2008) 42 Ca1.4th 960, 966.) While defendant's trial counsel objected to instructing the jury on aiding and abetting liability, she did not assert the prosecutor committed misconduct by requesting the instructions or to the timing of his request for instruction on this theory of liability.

Nor does the record support a finding of prosecutorial misconduct. ""The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ""the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."" [Citation.]" [Citation.]" [Citation.]" *(People v. Stanley* (2006) 39 Cal.4th 913, 951.)

The prosecutor requested the aider and abettor instructions outside the jury's presence. Contrary to defendant's claim that he was "deprived of [the] ability to counter this alternative theory with evidence," the trial court agreed to instruct on it,

citing the "evidence that's been presented *.from both sides* regarding the issue of whether or not [defendant] had the ability ... to inflict the blow that resulted in ... Smith's death," plus other evidence indicating defendant "was involved and benefited from it, [and also] had a motive for it .... " (Italics added.)

Knowing the court was going to instruct on aider and abettor liability, defense counsel was afforded a sufficient opportunity to refute the aiding and abetting liability theory in her closing argument and did so. Asserting "[n]ow, that we've proven [defendant] couldn't have done it" and "proven there wasn't the time" for him to commit the murder, she referred to the "phantom second guy" as "a new theory in this case, [presented] for the first time ever ... today."

What's more, as discussed above, the prosecutor's reference to aiding and abetting liability during his rebuttal argument was abbreviated, merely acknowledging "[h]eck, no, it's not my theory," and "[t]hat's not what I think happened." In fact, the argument on this point was so meager that after he finished, defense counsel again unsuccessfully sought to eliminate the aiding and abetting instructions claiming the prosecutor "did not argue any alternative theory to the jury .... " "He essentially told the jurors it was the court's position that the aiding and abetting instruction[s] ha[ve] to be given .... [¶] Now, he ... failed to argue it, other than to say it's the People's position [defendant] did it .... " The prosecutorial misconduct claim lacks merit.

d. Due Process

Next, defendant claims the prosecution violated his right to due process by failing to provide adequate notice of the aider and abettor liability theory, resulting in a "'trial by ambush.'" We disagree.

"Both the Sixth Amendment of the federal Constitution and the due process guarantees of the state and federal Constitutions require that a criminal defendant receive notice of the charges adequate to give a meaningful opportunity to defend against them. [Citations.]" *(People v. Seaton* (2001) 26 Cal.4th 598, 640.) However, "[w]e have long held that under this state's statutory scheme, an accusatory pleading charging a defendant with murder need not specify the theory of murder on which the prosecution intends to rely. [Citations.] Although we have recognized that there are situations in which the United States Constitution may require greater specificity [citations], generally the accused will receive adequate notice of the prosecution's theory of the case from the testimony presented at the preliminary hearing or at the indictment proceedings. [Citation.]" *(People v. Diaz* (1992) 3 Cal.4th 495, 557.)

The information charged defendant with murder in compliance with the governing statutes (Pen. Code,§§ 951,952 & 971), alleging "in violation of[s]ection 187[, subdivision] (a) of the Penal Code" he "unlawfully and with malice aforethought kill[ed]" Smith. Furthermore, even if this case required greater specificity concerning the basis of defendant's liability, the evidence presented at his preliminary examination provided it.

During that hearing, Chris McShane, an investigator in this case, testified the police received information from David Moraga, a jail inmate who shared a cell with defendant during the latter's pretrial detention. McShane testified Moraga claimed defendant "had told him that he [defendant] had to get rid of his wife because she was standing in the way of his future plans; that she was threatening to divorce him and he wasn't going to give up half of his property he worked so hard for his entire life. [Defendant] [s]aid on the day of the murder he had left the house earlier than he normally does, that [when] he left, he took the jewelry and the money out

of the safe with him. He staged it to look like a home invasion robbery. He left a window open. He exited the house without setting the alarm. He went through the front door of the house, and that he went to work that day."

On cross-examination, McShane provided the following additional testimony: "Q. Did Mr. Moraga ... tell you the manner in which the killing was carried out? [¶] A. He said that she was beat up real bad. [¶] Q. Did he give any further details? [¶] A. No. [¶] Q. Did he tell you who specifically did the killing? [¶] I notice you're pausing .... [¶] ... [¶] Q. And [Moraga] really didn't have any information about who specifically did the homicide, did he? [¶] A. [Defendant] never told him specifically who did it, no. [¶] Q. And [Moraga] didn't really have any information, for example, about the wrist[s] being bound with wire, correct? [¶] A. Correct. [¶] Q. Or any anal tears, correct? [¶] A. Correct. [¶] Q. Or that she was bludgeoned with a type of fireplace implement? [¶] A. Correct. [¶] Q. He didn't know any of the details of the homicide itself and how it was carried out, correct? [¶] A. Correct. [¶] Q. Did he tell you that the homicide was committed before [defendant] left the house or was he vague on that point? [¶] A. He was vague. [¶] Q. In fact, he wasn't able to tell you whether this supposedly occurred in the morning, in the afternoon, or the evening, correct? [¶] A. Correct."

The prosecutor did not call Moraga as a witness at trial. But the preliminary examination testimony about statements defendant purportedly made to Moraga reflect that, not only did he have a motive to kill his wife, participated in planning her murder and staging the house to make it appear the murder was the result of a botched burglary, but it also suggests defendant may not have personally committed the murder. Thus, even in the absence of an aider and abettor liability allegation in the information, the evidence presented at defendant's preliminary examination meaningfully apprised

him of the potential for an aiding and abetting theory.

Defendant relies on *Sheppard v. Rees* (9th Cir. 1989) 909 F.2d 1234 to support this argument. That case is unpersuasive for two reasons. First, *Sheppard* is of doubtful precedential effect. It involved a murder conviction where the defendant claimed the prosecution failed to give him adequate notice it intended to proceed on a felony-murder theory. The Supreme Court has "long held that a pleading charging murder adequately notifies a defendant of the possibility of conviction of first degree murder on a felony-murder theory. [Citations.]" *(People v. Gallego* (1990) 52 Cal.3d 115, 188-189.)

Second, *Sheppard* is distinguishable from this case. There the prosecution charged the petitioner with first degree murder on a premeditated and deliberate killing theory. But after the parties rested and the trial court settled the instructions, the prosecutor, over a defense objection, successfully urged the court to instruct on and allow him to argue felony murder based on a killing during the course of a robbery. On a postconviction habeas corpus petition, the Ninth Circuit Court of Appeals reversed, accepting the California Attorney General's concession the "'petitioner *was* denied adequate notice and opportunity to prepare to defend'" "because a *pattern of government conduct affirmatively misled [him]*." *(Sheppard v. Rees, supra,* 909 F.2d at p. 1236.)

Here, the information and preliminary examination testimony adequately notified defendant he could be prosecuted for murder as an aider and abettor. The prosecution's request for aiding and abetting liability instructions occurred during the parties' general discussion of the jury instructions and not just prior to closing argument. The prosecutor did not mention the aider and abettor theory during closing argument and, as explained

above, mentioned it only briefly during rebuttal as a fall back position. As in *People v. Gallego, supra,* 52 Cal.3d 115, the prosecution "avoid[ed] the 'ambush' situation faced by the defendant in *Sheppard,"* and did not deny defendant "the notice guaranteed him under the Constitution." *(Id.* at p. 189.)

e. Instructional Error

Defendant also claims the trial court committed instructional error concerning the aiding and abetting theory by including inapplicable portions of CALC RIM Nos. 400 and 401. His contentions lack merit.

In giving CALCRIM No. 400, the court read an optional portion contained in brackets stating, "Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime." Defendant notes this part of the instruction is relevant only when the natural and probable consequences doctrine applies and since "such instruction was certainly not justified by the evidence," the court read it "no doubt through oversight." Nonetheless he argues the error prejudiced him, claiming this part of the instruction also told the jury he "could be found guilty of a charged crime by virtue of aiding some other crime, but was not informed of the ... requirements" set forth in *People v. Prettyman* (1996) 14 Cal. 4th 248, "which must be fulfilled before applying that vicarious liability principle .... "

As for CALC RIM No. 401, defining what must be proved to establish aiding and abetting an intended crime, defendant challenges the court's addition of two optional portions of the standard instruction. The first disputed aspect declares: "If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the

defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor." The second challenged portion ofCALCRIM No. 401 concerned when and how one withdraws from aiding and abetting a crime. Again defendant notes "there was not a scintilla of evidence to support" a finding he "aided the perpetrator in the planning of the crime, [but] then attempted to withdraw from the commission of the crime .... " He claims prejudice resulted because it "introduced a particularly powerful concept into the jury's deliberations - that of the defendant's failure to prevent the crime as a basis for conviction - and the impact of that error must be considered in the context of the other aiding and abetting instructions."

Defendant acknowledges the challenged portions ofCALCRIM Nos. 400 and 401 were irrelevant to this case. "'[T]he crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions.' [Citations.]" *(People v. Smith* (2007) 40 Cal.4th 483, 517-518.) The court gave the standard instruction informing the jury "[s]orne of these instructions may not apply at all," and "[d]on 't assume just because I give a particular instruction that I'm suggesting anything about the facts. After you decide what the facts are, follow the instructions that apply to those facts as you find them."

Furthermore, the use of abstract instructions is rare! y a basis for reversal. "Giving an instruction that is correct as to the law but irrelevant or inapplicable is error. [Citation.] Nonetheless, giving an irrelevant or inapplicable instruction is generally "'only a technical error which does not constitute ground for reversal.'" [Citation.]" *(People v. Cross* (2008) 45 Cal. 4th 58, 67.) In *People v. Prettyman. supra,* 14 Cal.4th 248, the Supreme Court applied this rule, noting "(t]he superior court's error in giving an 'abstract' instruction on the natural-and-probable-

consequence rule" was "harmless" because "[t]he instruction on the rule must have been understood, and dismissed, by the jury as mere surplusage. [Citation.] It carmot be held to have resulted in a 'miscarriage of justice.' [Citation.]" (*Id.* at p. 280.)

Defendant's contentions as to how the jury could have construed the inapplicable portions of CALC RIM Nos. 400 and 401 are not persuasive. "In reviewing any claim of instructional error, we must consider the jury instructions as a whole, and not judge a single jury instruction in artificial isolation out of the context of the charge and the entire trial record. [Citations.]" *(People v. Dieguez* (2001) 89 Cal.App.4th 266, 276; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 ["'the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction'"].) "When a claim is made that instructions are deficient, we must determine whether their meaning was objectionable as communicated to the jury. . . . The meaning of instructions is no longer determined under a strict test of whether a 'reasonable juror' *could* have understood the charge as the defendant asserts, but rather under the more tolerant test of whether there is a 'reasonable likelihood' that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel. [Citations.]" *(People v. Dieguez, supra,* 89 Cal.App.4th at p. 276.)

Contrary to defendant's argument, it is unlikely a reasonable jury would view the abstract instructions as a third basis for finding him guilty of his wife's murder. This "third way" was not argued to the jury. The prosecution sought to convict defendant of his wife's murder as the actual killer, suggesting only that he could be convicted for aiding and abetting another in committing the murder as a contingent alternative. No evidence supported theories that he could be convicted of murder because he either assisted in commission of

some other unidentified crime or failed to try to stop the murder from occurring. Nor was there any claim or evidence suggesting defendant attempted to withdraw from this criminal enterprise before the murder occurred. The trial court's reading of irrelevant portions of the aiding and abetting instructions was harmless.

2. The 1991 Altercation

a. Introduction

In a pretrial hearing, the court granted a prosecution request to introduce the testimony of Annis Cravin, a former neighbor of the Smiths, concerning a physical altercation between defendant and his wife, finding the testimony relevant to the issue of identity.

At trial, Cravin testified that in 1991 the Smiths lived next door to her. Early one evening, Smith arrived home and rushed into the house, slamming the door behind her. Shortly thereafter, defendant arrived and entered the house. Cravin heard yelling and loud talking coming from their residence. She then heard Smith scream, some rumbling, and then what sounded like a gunshot. Cravin called 911. The police arrived and took defendant away in handcuffs. Several minutes later, Smith emerged from the home with paramedics bleeding profusely from her right temple. Cravin saw Smith the next day. She had several stitches in her head. Defendant returned to the home the next day as well. The court instructed the jury "you may, but are not required to, consider th[e] evidence for the limited purpose of deciding whether or not the defendant was the one who committed the crime charged in this case."

b. Admissibility of the 1991 Altercation

Defendant challenges the admission ofCravin's testimony, claiming it failed to satisfy the

requirement of substantial similarity required for other crimes evidence admitted to establish identity under Evidence Code section 1101, subdivision (b). Also, because the incident occurred more than 10 years before Smith's murder, he argues the evidence was inadmissible as propensity evidence under Evidence Code section 1109, subdivision (e). Finally, he contends the trial court erred by not excluding Cravin's testimony under Evidence Code section 352.

"Generally, the prosecution may not use a defendant's prior criminal act as evidence of a disposition to commit a charged criminal act. (Evid. Code,§ 1101, subd. (a).) But evidence is admissible 'when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge ...) other than his or her disposition to commit such an act.' (Evid. Code, § 1101, subd. (b).)" *(People v. Davis* (2009) 46 Cal. 4th 539, 602.) "'We review for abuse of discretion a trial court's rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352.' [Citation.]" *(Ibid.)*

The trial court admitted evidence of the 1991 altercation on the issue of identity. Prior misconduct evidence is generally admissible to prove identity only if "the uncharged misconduct and the charged offense ... share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' [Citation.]" *(People v. Ewoldt* (1994) 7 Cal.4th 380, 403.)

However, an exception to this rule applies to a defendant's prior assault on the victim of the charged offense. "Without resort to a 'distinctive *modus operandi'* [citation], 'signature' [citation], 'calling card' [citation] analysis of *otherfactors,* ' ... the common mark of the identical perpetrator and identical victim in both the charged and uncharged offenses is so distinctive that it adds persuasive

support to the inference that defendant and not some other person was the perpetrator ... []' [citations] and renders the prior evidence admissible on the issue of identity." *(People v. Zack* (1986) 184 Cal.App.3d 409, 414; see also *People v. Beamon* (1973) 8 Ca1.3d 625, 633 ["the common mark of the identical perpetrator and identical victim in both the charged and uncharged offenses is so distinctive that it adds persuasive support to the inference that defendant and not some other person was the perpetrator of both offenses"].) Thus, "[w]here a defendant is charged with a violent crime and has or had a previous relationship with a victim, prior assaults upon the same victim, when offered on disputed issues, e.g., identity, intent, motive, etcetera, are admissible based solely upon the consideration of identical perpetrator and victim without resort to a 'distinctive modus operandi' analysis of other factors." *(People v. Zack, supra,* 184 Cal.App.3d at p. 415.)

Although *Zack* was decided before the Supreme Court decided *People v. Ewoldt, supra,* 7 Cal.4th 380, *People v. Linkenauger* (1995) 32 Cal.App.4th 1603 held *Zack* and the case law on which it relied is still valid. "The California Supreme Court's ' ... statements of law remain binding on the trial and appellate courts of this state [citations] and must be applied wherever the facts of a case are not fairly distinguishable from the facts of the case in which [it has] declared the applicable principle of law.' [Citation.] The general rules promulgated in *Ewoldt* are not here controlling because the instant factual context is fairly distinguishable." *(* at p. 1613.) Thus, the rule declared in *Zack* "survive[d] *Ewoldt." (Ibid.)*

Defendant alternatively argues the holdings in *Zack* and *Linkenauger* were legislatively overruled by the 1996 enactment of Evidence Code section 1109, which places a 10-year limit on the admissibility of prior domestic violence evidence. This claim lacks merit. Subject to certain limitations, section 1109

allows for admission of "evidence of the defendant's commission of other domestic violence" in "a criminal action in which the defendant is accused of an offense involving domestic violence .... " (Evid. Code,§ 1109, subd. (a).) Thus, it allows the admission of prior acts of domestic violence only to establish the defendant's propensity to commit such acts. *(People v. Hoover* (2000) 77 Cal.App.4th 1020, 1024, 1027-1028.) The exception recognized in subdivision (b) of section 1101 applies when the prior act evidence is "relevant to prove some fact ... other than his or her disposition to commit such an act." (Evid. Code,§ 1101, subd. (b).) *Zack* and *Linkenauger* involve applications of the latter rule. In this context, "[n]o specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible. [Citations.]" *(People v. Branch* (2001) 91 Cal.App.4th 274, 284.)

Defendant also argues the trial court erred by not excluding Cravin's testimony under Evidence Code section 352. We review a ruling under this statute for abuse of discretion. *(People v. Mungia* (2008) 44 Cal. 4th 1101, 1130.) The mere fact the trial judge did not state on the record his consideration of Evidence Code section 352 did not constitute error. "Although the record must 'affirmatively show that the trial court weighed prejudice against probative value' [citations], the necessary showing can be inferred from the record despite the absence of an express statement by the trial court. [Citation.] The record indicates the court gave careful consideration to defendant's claims at hearings held outside the presence of the jury. The court considered an offer of proof as to the anticipated testimony ... and excluded certain damaging elements of the witness's statements from evidence. The court referred to the high probative value of the evidence, and we properly may infer that the court determined that the probative value outweighed any undue prejudice." *(People v. Prince* (2007) 40 Cal.4th 1179, 1237.)

Here, the prosecution's pretrial motion sought a determination on the admissibility of several prior acts of violence by defendant. The parties' points and authorities on these evidentiary requests cited to Evidence Code section 352. Both the court and counsel referred to the factors of the probative value of each incident, the remoteness of the events, and the potential for prejudice from the admission of each incident. After extensive briefing and argument on the issue, the court limited the prosecution to introducing Cravin's testimony. We conclude the trial court balanced the statutory factors and properly exercised its discretion in finding evidence of the 1991 altercation admissible. No error occurred in admitting evidence concerning the 1991 altercation.

c. Prosecutorial Misconduct

Defendant also contends the prosecutor committed misconduct by misstating the law concerning use of the 1991 altercation evidence. During rebuttal, the prosecutor asserted "the 1991 bludgeoning where the defendant beat ... Smith" was "one of the biggest indicators of marital discord" "[b]ecause the law tells you it's a great indicator. ... The law tells you that's such powerful evidence you can use it if it's proven by a preponderance that that beating took place . . . . And it's undisputed at this point. That is such powerful evidence you can use it to determine the identity of the murderer." Defendant claims this argument misstated the law by claiming, since the jury had to first determine whether it was more likely than not that defendant struck Smith in 1991 before it could consider the probative value of the incident, "the prosecutor ... turned the truth on its head by claiming that ... meant ... the law ascribed an elevated worth to uncharged prior offense evidence."

As before, we note defendant failed to object to this statement or request the jury be admonished. Thus, the issue has been waived. *(People v. Lopez, supra,* 42 Cal. 4th at p. 966.)

Even on the merits, defendant's argument fails. "Regarding the scope of permissible prosecutorial argument, ""a prosecutor is given wide latitude during argument."'" *(People v. Stanley, supra,* 39 Ca1.4th at p. 951.) "[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complainedof remarks in an objectionable fashion. [Citation.]" *(People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Applying these standards, we find no misconduct. Defendant's claim, the prosecutor argued "the law ascribed an elevated worth to uncharged prior offense evidence," takes the prosecutor's arguments out of context. A more reasonable interpretation of the prosecutor's statements is that the 1991 incident was probative of both the marital discord between defendant and Smith and as to the identity of Smith's killer. This misconduct claim lacks merit.

3. The Limitation on Defense Expert Testimony

The final claim is that the trial court erred by precluding the defense from questioning its expert witness on crime scene staging about defendant's statements as to when he placed the jewelry in his car trunk. Defendant argues the prosecution opened the door to admission of the statements and then committed misconduct by referring to the lack of this evidence during closing argument.

a. Introduction

As mentioned, just after the murder, defendant made statements to the police identifying jewelry he noticed missing from the residence. A week later, the police found the missing jewelry in the trunk of defendant's car. When confronted with this discovery, defendant purportedly told the police

he had placed the jewelry in his trunk months earlier.

Before trial, the defense sought to have Moses testify defendant had a habit of taking back gifts if he felt unappreciated, and that he told her several months before Smith's murder he had taken his wife's jewelry and placed it in the trunk of his car. In addition, at this time the prosecution was still considering calling Moraga to testify as to defendant's incriminating statements about the murder while in pretrial detention. In part, Moraga also purportedly told the police defendant said he placed the jewelry in his car before the murder.

Citing defendant's purported statements to Moraga and the police, the defense argued Moses's testimony was admissible as a prior consistent statement being introduced to rebut a claim of recent fabrication. (Evid. Code,§§ 1236 & 791, subd. (b).) The court ruled Moses's testimony concerning what defendant purportedly told her months before the murder would only be admissible if either (1) the police officer who confronted defendant with the discovery of the jewelry in his trunk testified to what defendant said at that time, or (2) Moraga took the stand and testified defendant claimed to have taken the jewelry before the murder. Moraga was not called to testify at trial, and the prosecutor did not ask the arresting officer if defendant said anything when the police discovered the jewelry in his car's trunk.

At trial, each party called an expert witness on crime scene staging. These witnesses gave contradictory opinions on whether the apparent burglary at the Smith residence had been staged. The defense expert, Brent Turvey, testified the physical evidence did not support a conclusion the burglary had been staged. Asked on direct examination about the jewelry found in the car's trunk, Turvey testified that to tie this evidence to the murder "you need physical evidence to associate it with the crime," and "[y]ou have to be able to establish when that jewelry

was put in that location."

On cross-examination, when the prosecutor asked Turvey "Did you review the statements of ... witnesses in the case," he responded, "I did not. In fact, I wanted to remain as impartial in favor of the physical evidence as I could, so I refrained from reviewing as much information that came from witnesses as possible." The prosecutor also asked Turvey if he "compare[d] ... statements made about the jewelry" with the physical evidence, Turvey said, "No." Asked, "Wouldn't you want to consider the statements made by people regarding the one thing that was identified as positively ... missing from the crime scene and test the falsity of that," Turvey responded "we don't have ... in this case ... physical evidence that associates that actual
jewelry ... with the crime. So until we have that, until we associate it with the actual crime, then any statements made by any witnesses are sort of irrelevant."

After a noon recess, the prosecutor continued cross-examining Turvey. At one point, he asked: "If, hypothetically, a homeowner claimed that he was absolutely certain that some very specific jewelry was in a certain location before the burglary, and pointed the location out to police and described several items of jewelry ... , and then he further ... described [the] kinds of ... containers the jewelry was in, ... and then that jewelry was subsequently ... found in the trunk of his own car ... and wrapped in duct tape that was consistent with duct tape found at the crime scene, does that affect your opinion one way or the other as to whether or not the crime scene is staged?" Turvey responded, "No."

Although denying defense counsel's request to immediately approach the bench, the court allowed her to do so before beginning redirect examination. Defense counsel explained that, over the lunch recess, she "familiarized Mr. Turvey with ... all of the statements" from defendant. Claiming the

prosecutor's question "only offered the statements from the walk-through and from the night that Mrs. Smith was found murdered" while "object[ing] to my introducing the statement that [defendant] made when he was arrested," defense counsel claimed the prosecutor "has opened th[e] door" and she "should now be permitted to inquire, was [Turvey] aware of a[] statement by [defendant] at the time of his arrest .... " The trial court denied the request.

b. Analysis

Citing *People* v. *Bell* (2007) 40 Cal. 4th 582, and repeating the claim the prosecutor "clearly opened the door to a redirect examination on whether [the defense expert's] opinion was influenced by ... [defendant's] statements," defendant now contends the trial court erred in limiting redirect examination of the defense staging expert concerning his statements to Moses and the police about when he placed the jewelry in the trunk of his car. This contention lacks merit.

"Expert testimony may ... be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. [Citations.] ... [¶] So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony. [Citations.] And because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter ... upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion. [Citations.]" *(People* v. *Gardeley* (1996) 14 Cal.4th 605, 618.)

In *People v. Bell, supra,* 40 Cal. 4th 582, the prosecution charged the defendant with capital murder based on a special circumstance allegation

that he killed the victim during the course of a robbery. To defeat the special circumstance allegation, the defendant presented evidence the killing occurred during a drug-induced psychotic break with reality. One expert called by the defense was a psychologist who interviewed defendant about his childhood, drug use, and thoughts and feelings when killing the victim. The trial court sustained a prosecution objection to allowing the psychologist to repeat defendant's statements about the murder. However, during cross-examination, the prosecutor asked the psychologist to "clarity" how the defendant, who "'was bent on stealing so he could buy more cocaine, all of a sudden ... reverted back to when he was a child and remembered all the times he was in trouble in school.'" *(Id.* at p. 610.) The psychologist's answer referred to the defendant's statements. The prosecutor then objected to his own question and moved to strike the psychologist's answer. Defense counsel objected to the latter request. During a chambers conference, the trial judge agreed "the prosecutor had opened a door to [the psychologist's] relation of [the] defendant's statements, but observed that 'this is a complete mess because of all the objections. And I'm going to just strike it all.'" *(Id.* at p. 611.)

On appeal, the defendant challenged both the trial court's ruling limiting the scope of the psychologist's testimony on direct examination and striking the prosecutor's question and the psychologist's response during cross-examination. On the first issue, the Supreme Court agreed with the trial court's ruling. "While the potential for prejudice may not have been as great as suggested by the trial court, we agree with the Attorney General that the court's weighing of prejudice and probativeness was not arbitrary or capricious. [Citation.] Though the excluded statements were not particularly inflammatory, for the jury to separate their proper and improper uses would have been difficult." *(People v. Bell, supra,* 40 Cal.4th at p. 609.)

Although ultimately finding it harmless, the Supreme Court concluded the trial court did err by striking the psychologist's reference to the defendant's statements on cross-examination. "Having asked the proverbial 'one question too many' and received an answer he did not like, the prosecutor was not entitled to turn back the clock. Although the record of objections and motions may have been in a 'confused state,' as the trial court said, the prosecutor's question and [the psychologist's] answer were clear enough. The *evidence* was not in a particularly confused state, and there was no apparent reason to strike it." *(People v. Bell, supra,* 40 Cal.4th at p. 612.)

Under the foregoing authorities, the trial court properly barred the defense from using the crime scene staging expert as a platform to introduce defendant's otherwise inadmissible statements. The law generally allow an expert to describe the material upon which he or she relied to form an opinion, even if that material is otherwise inadmissible evidence. But, unless the expert claims he relied on certain material to form an opinion, a party is not entitled to employ the limited exception created by Evidence Code section 802 as a hook to introduce otherwise inadmissible evidence simply by disclosing the material to the expert.

For this reason, defendant's reliance on the decision in *People v. Bell, supra,* 40 Ca1.4th 582 is unavailing. There the psychologist relied on the defendant's statements about his thoughts and feelings when the murder occurred. Here, Turvey testified he based his opinion on the physical evidence and the testimony of other experts who analyzed the physical evidence. Turvey made it clear that, in forming his opinion, he "refrained from reviewing [witness statements] as much ... as possible."

Nor can defendant argue the prosecutor "opened the door" to admit defendant's prior

statements about when he placed the jewelry in the car. During crossexamination, the following colloquy occurred: "Q. "So as a forensic scientist, you're going to disregard anything that anybody says? [¶] A. No. I treat anything that anyone says as a theory. A victim and suspect statements are theories against which must be compared to [the] physical evidence . . . . [¶] Q. Did you compare, just for theoretical purposes, statements made about the jewelry in this case? [¶] A. No. [¶] Q. Not even for theoretical purposes? [¶] A. No." Although defense counsel complained that the prosecutor's hypothetical question failed to include all of the relevant statements, she did not object to the question. *(People v. Roberts* (2010) 184 Cal.App.4th 1149, 1193 ["A party forfeits the right to claim error as grounds for reversal on appeal when he or she fails to raise the objection in the trial court"].) The trial court properly barred defense counsel from questioning Turvey about defendant's otherwise inadmissible statements concerning when he placed the jewelry in the vehicle.

c. Prosecutorial Misconduct

During rebuttal, the prosecutor argued, "If you find that the defendant lied about facts surrounding the crime, you get to use that as you figure out is he guilty. Guilty people lie .... [I]f this defendant lied about something- gee, I don't know –like the jewelry that we have heard no explanation for. None. [¶] ... [¶] Use the jury instructions for consciousness of guilt. Look at the jewelry, his lies to the police, his hiding and suppressing evidence. It's over. It's over. It's that simple." Defendant now claims since his statements to Moses and the police concerning when he placed the jewelry in the trunk had been excluded at the prosecution's request, the prosecutor's "absence of [an] explanation" argument amounted to misconduct.

As before, no objection was interposed at trial nor was there a request for admonishment. Thus, the prosecutorial misconduct claim has been waived.

Furthermore, based on the foregoing discussion, it is also without merit. While a prosecutor commits misconduct by arguing the defense failed to present evidence where its absence is the result of an erroneous evidentiary ruling obtained at the prosecution's urging *(People v. Varona* (1983) 143 Cal.App.3d 566, 570), "[b]ecause the prosecutor's argument constituted fair comment on the evidence, following evidentiary rulings we have upheld, there was no misconduct and, contrary to defendant's claim, no miscarriage of justice" *(People v. Lawley* (2002) 27 Cal.4th 102, 156).

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

IKOLA, J.

FILED November 22, 2013

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARVIN VERNIS SMITH,
Petitioner - Appellant,
v.
RAUL LOPEZ, Warden,
Respondent – Appellee.

No. 12-55860
8:11-cv-01076-ODW-MRW
U.S. District Court for Central California, Santa Ana

MANDATE

The judgment of this Court, entered September 23, 2013, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:
Molly C. Dwyer
Clerk of the Court

Rhonda Roberts
Deputy Clerk

FILED November 8, 2013

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARVIN VERNIS SMITH,
Petitioner - Appellant,
v.
RAUL LOPEZ, Warden,
Respondent – Appellee.

No. 12-55860
8:11-cv-01076-ODW-MRW
U.S. District Court for Central California,
Santa Ana

ORDER

Before: THOMAS and HURWITZ, Circuit Judges, and BEISTLINE, Chief District Judge.*

The panel has voted to deny the petition for rehearing. Judges Thomas and Hurwitz have voted to deny the petition for rehearing en banc and Judge Beistline so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are denied.

*The Honorable Ralph R. Beistline, Chief District Judge for the U.S. District Court for the District of Alaska, sitting by designation.

RECORD
AND
BRIEFS

No. 13-946

In The
Supreme Court of the United States

RAUL LOPEZ, Warden,

Petitioner,

v.

MARVIN VERNIS SMITH,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should review on certiorari a Ninth Circuit decision which, after correctly stating habeas law and accurately summarizing this Court's jurisprudence defining a criminal defendant's due process right to adequate and timely notice of the charges against him, ruled on case-specific and fact-intensive grounds that the state court's denial of Defendant Smith's due process notice claim was objectively unreasonable.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
BRIEF IN OPPOSITION	1
INTRODUCTION	1
STATEMENT	6
A. Factual Background	6
B. The First State Appellate Court Decision	13
C. The Second State Appellate Court Decision	15
D. The District Court Decision	20
E. The Ninth Circuit Decision	21
REASONS FOR DENYING THE PETITION	25
I. THE QUESTION PRESENTED BY PETITIONER HAS LITTLE IF ANYTHING TO DO WITH THIS CASE	25
II. THE NINTH CIRCUIT CORRECTLY DECIDED THE CASE	27
III. EVEN WERE THE "QUESTION PRESENTED" BY THE STATE RELEVANT, IT SHOULD BE ANSWERED IN FAVOR OF RESPONDENT SMITH	30
CONCLUSION	38

TABLE OF AUTHORITIES

Page

CASES:

Batchelor v. Cain, 682 F.3d 400 (5th Cir. 2012).....26

Ben-Yisrayl v. Davis, 431 F.3d 1043 (7th Cir. 2005).....26

Brecht v. Abrahamson, 507 U.S. 619 (1993).....24, 30

Burt v. Titlow, 134 S.Ct. 10 (2013).....27

Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).....38

Carlson v. Jess, 526 F.3d 1018 (7th Cir. 2008) 28

Cash v. Maxwell, 132 S.Ct. 611 (2012).....28, 29

Drake v. Portuondo, 553 F.3d 230 (2d Cir. 2009).....2

Griffin v. United States, 502 U.S. 46 (1991).....26, 30

Kyles v. Whitley, 514 U.S. 419 (1995) 4

Lafler v. Cooper, 566 U.S. ___, 132 S.Ct. 1376 (2012).....32

Lankford v. Idaho, 500 U.S. 110 (1991)....34, 35, 36, 37

Lockyer v. Andrade, 538 U.S. 63 (2003).....32

Maggio v. Fulford, 462 U.S. 111 (1983) 26

Maxwell v. Roe, 628 F.3d 486 (9th Cir. 2010) 29

Norton v. Spencer, 351 F.3d 1 (1st Cir. 2003), *cert. denied*, 542 U.S. 933 (2004).....26

Panetti v. Quarterman, 551 U.S. 930 (2007) 28, 32

United States v. Maloney, ___ F.3d ___, 2014 WL 801450 (9th Cir. Feb. 28, 2014).....6

TABLE OF AUTHORITIES – Continued

Page

Wiggins v. Smith, 539 U.S. 510 (2003).....26

Williams v. Taylor, 529 U.S. 362 (2000).....31, 32

Wilson v. Corcoran, 131 S.Ct. 13 (2010).....27

Wood v. Allen, 558 U.S. 290 (2010) 27

CONSTITUTIONAL PROVISIONS:

Sixth Amendment.....24, 28, 31

Fourteenth Amendment.....29

STATUTES:

28 U.S.C. § 2254(d).....2, 3, 5

28 U.S.C. § 2254(d)(1).....*passim*

28 U.S.C. § 2254(d)(2).....*passim*

28 U.S.C. § 2254(e)(1).....27

RULES:

Sup. Ct. R. 10.....4, 5

BRIEF IN OPPOSITION

Respondent Marvin Vernis Smith (hereinafter "Defendant" or "Smith") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by the Petitioner State of California ("the State").

INTRODUCTION

Rejecting the arguments that the State now repackages for this Court, five federal judicial officers (a magistrate judge (Pet. App. D), a district judge (Pet. App. C), and three appellate judges (Pet. App. A)) all agreed that habeas relief was warranted in this case. Following the unanimous Ninth Circuit panel decision, the State sought rehearing *en banc* and not a single judge of the 29-judge court of appeals requested a vote on the petition. (Pet. App. I.) This unanimity of opinion alone indicates that the decision at issue is a poor candidate for this Court's discretionary exercise of its certiorari jurisdiction.

That suggestion is overwhelmingly proven by the certiorari petition itself, permeated as it is with a fundamental misapprehension of both federal habeas law and the decision below. The petition fails entirely to differentiate between AEDPA review under 28 U.S.C. § 2254(d)(1) and (d)(2). The Ninth Circuit explicitly found that this case merited *de novo* review under the (d)***(2)*** gateway because the state appellate court based its decision on two unreasonable findings

of fact. (Pet. App. A at 23-24.) As will be demonstrated, the unreasonableness of those findings is beyond fairminded debate. Yet, the State asks this Court to intervene because the Court's fair-notice cases do not provide clearly established federal law within the meaning of § 2254(d)*(1)* to permit *de novo* review of the state courts' disposition of the due process issue presented by Smith. That proposition is simply untrue, as will be discussed in section III, *infra*. But even if the court of appeals also relied (albeit far less explicitly) on (d)(1), that reliance would be entirely beside the point given that subsection (d)(2) provides an alternative, independent, and sufficient gateway to *de novo* review and habeas relief.

Section 2254(d) is written in the disjunctive. The Ninth Circuit properly exercised *de novo* review of the state appellate court's decision following its § 2254(d)(2) review because of the state court's unreasonable *factfinding*. Whether there was an unreasonable application or infringement of "clearly established Federal law" by the state court within the meaning of § 2254(d)(1) does not constrain a federal court's analysis under (d)(2). *See, e.g., Drake v. Portuondo*, 553 F.3d 230, 239 n.4 (2d Cir. 2009) ("The terms of Section 2254(d)(2) do not limit a federal court's power to grant a writ to situations in which a state court acted in violation of 'clearly established Federal law.'"). The State seeks to gloss over that fundamental point in, among other places, a "Question Presented" premised entirely on the purported absence of a sufficiently on-point holding of this

Court. (Pet. at i.) The State then *begins* its statement of reasons why, in its view, certiorari should be granted with the following:

> The Ninth Circuit set aside Smith's state murder conviction without any demonstration that the state courts' treatment of his notice claim was contrary to a rule of federal law clearly established by decisions of this Court . . . [Pet. at 13].

No such demonstration is required in a § 2254(d)(2) case.

The State argues certiorari should be granted because the court of appeals did not, in its opinion, proceed with a proper (d)(1) analysis (Pet. at 14-15) – it framed its "Question Presented" in just those terms (Pet. at i) – but the circuit's (d)(2) analysis is dispositive.

Both the state appellate court and the Ninth Circuit agreed that, to satisfy the federal constitution's fair-notice mandate, greater specificity may be required beyond the mere stating of charges in a charging document. (Pet. App. A at 12.) The state and federal courts differed only on the case-specific, factual question of whether such greater specificity was timely provided to Defendant Smith. The precise question answered by the federal district and appellate courts under 28 U.S.C. § 2254(d) review is whether the last reasoned state-court decision unreasonably found that such greater specificity was provided by certain statements of a jailhouse informant,

conveyed to Smith through a testifying law enforcement official at the preliminary hearing. (*See* Pet. App. G at 88 (state appellate court's holding that "the information and preliminary examination testimony adequately notified defendant he could be prosecuted for murder as an aider and abettor").)

Those informant statements plainly did not provide meaningful notice. The hearsay informant statements, *on their face*, provided no notice of a possibility that the State might pursue an aiding-and-abetting theory of liability; furthermore, it was settled prior to trial that the informant would not be testifying in any event. *Either* fact, standing alone, defeats the State's claim that adequate and timely notice was provided of the State's eleventh-hour gambit – announced for the first time after the parties rested and closing arguments were about to commence – to pursue a vicarious-liability theory. *No* amount of AEDPA deference could uphold the state court's adequate-notice finding.

This Court is not a court of error correction. *See*, *e.g.*, Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."); *Kyles v. Whitley*, 514 U.S. 419, 456 (1995) (Scalia, J., dissenting) ("The Court has adhered to the policy that, when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally . . . be denied."). Yet, as framed by the State, the "Question Presented" asks this Court to do nothing other than

correct the court of appeals' purported failure to properly apply habeas law that the circuit correctly stated. There is, consequently, no "compelling reason" (Sup. Ct. R. 10) warranting this Court's intervention in this unique, heavily fact-bound case *even if* the State were correct in its legal analysis, which it is not. This case presents a fact pattern unlikely to repeat itself. (*See, e.g.*, Pet. App. D at 54 (Magistrate Judge's "recogniz[ing] the uniqueness of the circumstances in this case."))

Moreover, this Court has *already* provided guidance, through multiple decisions, on how federal habeas courts should "apply the deferential standard of review required by 28 U.S.C. § 2254(d)." (Pet. at I.) There is no circuit split regarding that deferential standard, let alone with respect to its application in the context of the deprivation of a defendant's bedrock, due process right to adequate and timely notice of the charges against which he must defend, and the State does not argue otherwise. There is no unsettled question of federal law presented by the State's petition.

Although the State seeks to portray the Ninth Circuit decision as of a piece with other Ninth Circuit habeas decisions that this Court has reversed over the last decade (Pet. at 24 & n.2-n.4), it is simply not so. The judges who sat on the appellate panel have no history of defiance of this Court's AEDPA jurisprudence, or a demonstrated inability to follow it. They are, rather, judges who recognized the glaring unfairness perpetrated against Smith at trial: wielding the

vicarious-liability instruction he was belatedly and erroneously given, the prosecutor sandbagged Smith's counsel by waiting until his rebuttal closing argument to argue that the jury could entirely credit Smith's defense, namely, that he was physically incapable of having perpetrated the charged murder, yet still convict him as an aider and abettor.[1] Likewise, the panel recognized the equally glaring unreasonableness of the state appellate court's disposition of the due process claim. This is a case that has been correctly decided, and there is no reason whatsoever for this Court to modify it.

STATEMENT

A. Factual Background

It is undisputed that the prosecution proceeded during the evidentiary phase of Smith's trial solely on a direct-perpetrator theory. As the prosecutor set it out in his opening statement: "[T]he evidence will show that man over there at the end of counsel table,

[1] In *United States v. Maloney*, ___ F.3d ___, 2014 WL 801450 (9th Cir. Feb. 28, 2014) (*en banc*), the court of appeals recently granted a government motion, filed while the case was under submission, to reverse the defendant's conviction, vacate the sentence, and remand to the district court based on the prosecutor's waiting until his rebuttal closing argument to make a new argument, thereby improperly "sandbagging" the defense. The State herein, in stark contrast, evinces no awareness of any impropriety whatsoever in the prosecutor's actions.

wearing the nice sweater, murdered his wife of 27 or 28 years, and then he staged the crime scene to make it look like a burglary and to avoid detection." (Pet. App. A at 5.) The prosecution introduced no evidence tending to prove that the homicide was perpetrated by a third party working in cahoots with Smith, nor did it mention any such theory to the judge, jury, or opposing counsel at any time prior to the close of evidence. As a result, Smith reasonably prepared for, and presented at trial, a defense to counter the direct-perpetrator theory. He had no cause to do otherwise.

Nonetheless, after both sides had rested and instructions were being settled, the prosecutor requested that the jury be instructed on aiding and abetting as set out in the state pattern jury instructions, a theory that encompassed elements different than those of the theory tried to the jury. The trial court agreed to so instruct over Smith's objections that (1) there was no evidence to support the instruction and (2) the prosecution had not announced its reliance on its new theory at a point in time when the defense could have countered it with evidence. The prosecutor then withheld his argument on the aiding-and-abetting theory until his rebuttal closing argument, thereby depriving the defense of any opportunity to even address his discussion of the theory, a discussion which would expressly urge the jury to reject Smith's defense, even if believed, as irrelevant under the vicarious-liability principles provided in the instructions he had secured.

More specifically, during the conference to settle instructions, just prior to the commencement of closing arguments, the prosecutor argued:

> The jury does not necessarily have to believe, and I think the defense will argue that the defendant did not or could not have committed the crime himself. But that doesn't mean that if he didn't commit the crime himself, that if they find that he aided and abetted in the crime that he's still not guilty of the crime.
>
> So if he didn't swing the murder weapon, it doesn't mean he's not guilty of the crime.

Defense counsel objected that there was "no evidence of any aider and abettor being involved in this crime," nor had the prosecution relied on such a theory. In the absence of evidence of aiding and abetting, counsel asserted, to instruct the jury on the theory merely because the defense introduced evidence that Smith could not have committed the crime would "invit[e] the jury to speculate about a universe of possibilities for which there is absolutely no evidence." Counsel noted, "This is the first time that aiding and abetting has been mentioned, right now." She was factually correct in all that she said.

The trial court, nonetheless, ruled that it had a *sua sponte* duty to give the instruction. Strikingly, it was the very strength of Smith's defense that led the court to that conclusion:

> There is a reasonable interpretation of the evidence, in the court's view, where the jury can go back and say, jeez, the defense put on all that testimony and evidence about Mr. Smith's injury and how he – his shoulder was so debilitated he couldn't have swung this object in such a way as to cause her death, so we don't find him to be the person that struck the blow.

The court also noted that the defense had presented a "strong case[ ] casting doubt on [Smith's] ability to inflict the blows that caused her death." It expressed its concern that the jury needed "guidance" should it adopt that "reasonable interpretation of the evidence" (apparently being unsatisfied that the guidance *already* contained in the instructions – that a jury must acquit if the prosecution has not proven its case beyond a reasonable doubt – sufficed):

> If we don't give the aiding and abetting instruction, essentially, we are leaving [the jurors] without legal guidance on what they can and cannot do if that's the way they determine the facts to be.

The court justified its decision with specific citation to the "considerable evidence that [Smith] was involved or benefitted from [the murder], had a motive for it, therefore, even though he is not the principal, he may very well have been an aider and abettor."[2]

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[2] This equation of motive with aider-and-abettor liability, rendering any heir of a murder victim a likely principal in the

(Continued on following page)

Having succeeded in obtaining the aiding-and-abetting instructions, the prosecutor rather remarkably *never mentioned* the theory in his initial closing argument later that day, instead belittling the notion that anyone other than Smith had bludgeoned the victim to death.

Following the conclusion of the prosecution's initial closing argument and just before the beginning of the defense argument, defense counsel filed a motion requesting that the court reconsider its decision to give aiding-and-abetting instructions. The motion pointed out to the court that, under California law, aiding-and-abetting liability could not be premised on an anonymous principal as to whom no evidence had been introduced by the prosecution. Midway through the defense closing argument, the court again addressed the issue, asking the prosecutor, "Is aiding and abetting a theory that you are relying on in this case?" After the prosecutor answered in the affirmative, the court noted that the "defense has repeatedly presented evidence pointing away from the defendant to some other person having killed Minnie Smith," but that did not preclude "the reasonable inference that, although maybe another person is the person who swung the log roller that killed Minnie Smith, that the defendant was not [*sic*] significantly involved in the commission of the offense."

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crime, is likely unprecedented in the annals of American criminal jurisprudence.

Deprived of any information as to what specifically the prosecution would say about its newly minted aiding-and-abetting theory, defense counsel, in the latter part of her closing argument, predicted that, during the State's rebuttal, "for the first time ever . . . you're going to hear the prosecution say there had to be a second person involved." The prosecution would introduce a "phantom second person," counsel warned, precisely because the defense had shown that Smith could not have done it.

In his closing rebuttal, as predicted, the prosecutor for the first time did indeed address the significance of the aiding-and-abetting instructions:

> But the fact of the matter is – and this is just the law – the defendant killed his wife. He wielded that fireplace tool himself. But if you don't believe that – or let's say three of you get back in the deliberations and say, I just don't know. I know he's involved. I know he's lying about the jewelry. He's got the jewelry. He's got duct tape that matches duct tape from his crime scene. I know he's in on it, but I'm not sure that he could have wielded that weapon.
>
> Well, guess what? You don't have to be. And that's the law.
>
> Is it my theory? Heck, no it's not my theory. That's not what I think happened. But it's not something that stops you from convicting him. [Defense counsel] knew I was going to address this.

Aiding and abetting means that – well, before I talk about aiding and abetting and you can be guilty, you are either the actual perpetrator, the guy who wielded the murder weapon or you aided and abetted someone else in committing the crime.

Aiding and abetting. All that means – all that means is, you aid or encourage or help in some way somebody else commit the crime with the intent that they commit that crime. That's all that means. And I'm – for the purpose of this case, I could care less which one you believe.

But the fact of the matter is, there is zero doubt that the defendant is involved in the murder of his wife and that he aided and abetted somebody or did it himself. None. Because there's no other explanation on the face of the planet that explains his lies, the possession of that jewelry wrapped in duct tape.

It's as simple as that.

And that's why I gave up on the 15 or 20 pages of notes I had on all the other stuff on the case, because it's that simple.

You do not even need to be present. We can talk about alibis and time of death and windows of opportunity and everything else until we're blue in the face.

The prosecution theory: He killed her before he left the house and he went to work. Does it matter if you buy that theory? He doesn't

> even have to be the one who wielded the murder weapon. He was. And he did.
>
> *And half of you can think it was one way and the other half think it's the other way, doesn't matter. That's still a guilty verdict.*

(Emphases added.)

B. The First State Appellate Court Decision

In its first decision, the state appellate court reversed Smith's conviction, holding that the evidence was insufficient to support the aiding-and-abetting instruction and that Smith was prejudiced by the trial court's error in so instructing. (Pet. App. E.) Viewing the record in a light most favorable to conviction, including resolving all evidentiary conflicts and drawing all reasonable inferences in support of the conviction, the court, nonetheless, found that no reasonable factfinder could have found Smith guilty on an aiding-and-abetting theory based on that record. (*Id.* at 70-71. After citing the evidence adduced by the defense that someone other than Smith had killed the victim (namely, Sam Matthews), the court relied on the fact that, nonetheless, there was no evidence that "another person [in concert with Matthews] participated in accomplishing this criminal enterprise." (*Id.* at 69.)

In distinguishing case law cited by the State, the court noted that, in this case, "the prosecutor relied solely on the theory that defendant killed his wife," the prosecutor only requested the aiding-and-abetting

instruction following the close of evidence precisely because he was concerned that the defense might have engendered a reasonable doubt regarding his direct-perpetrator theory, and there was a complete absence of evidence that Smith had ever discussed killing his wife with anyone or ever attempted to hire anyone to accomplish that end. (Pet. App. E at 69-70.) As the court summed it up, "An instruction on aiding and abetting as an alternative theory of liability is not justified merely because a defendant presents an arguably successful defense concerning his identity as the perpetrator of a crime." (*Id.* at 70.)

In analyzing the prejudice question in its initial opinion, the state court then reviewed the entire record to ascertain whether a reasonable probability existed that the jury found Smith guilty solely on the unsupported theory. In finding such reasonable probability, the court cited the prosecutor's own acknowledgment that some of the jurors might not be sure that Smith could have wielded the murder weapon (on account of his then-recent shoulder surgery). (Pet. App. E at 71.) It then cited the jury's request during deliberations to view the murder weapon as well as Smith's medical records, which evinced the jury's focus on that very question. (*Id.*)

The state appellate court also initially factored into its decision legal errors in the aiding-and-abetting instructions, which it found "exacerbated" the error of giving a factually unsupported instruction. (Pet. App. E at 71.) It here cited the standard that, where legally erroneous instructions are given,

the question becomes whether a reasonable likelihood exists that the jury applied them in an objectionable manner. (*Id.* at 71-72.) Because the trial court had erroneously included a natural-and-probable-consequences theory and withdrawal doctrine in its instruction, the appellate court refused to presume that the jury understood the instructions. (*Id.*)

C. The Second State Appellate Court Decision

After the California Supreme Court issued a summary order, *i.e.*, without merits briefing or oral argument, directing the state appellate court to reconsider its ruling, the lower court, again without further briefing or oral argument by the parties, completely reversed itself in a second opinion. (Pet. App. G.) This time, it discerned no prejudicial error. It again found no evidence to support the aiding-and-abetting instruction, but concluded that the record did not "affirmatively indicate the jury based its guilty verdict solely on the aider and abettor theory." (*Id.* at 82.) In theory at least, it was applying precisely the same prejudice standard it had previously applied, namely, whether a reasonable probability existed that the jury found Smith guilty solely on the unsupported theory. (*See* Pet. App. E at 71; Pet. App. G at 82 (citing same standard).) This time around, however, the evidence of the jury's focus during deliberations on Smith's strength was no longer evidence supporting a reasonable probability that it relied on the aiding-and-abetting theory, but, rather, was now entirely irrelevant because it would have

been unreasonable, in the court's view, for the jury to have relied on that theory. (Pet. App. G at 82-83.) The fact that the trial court had itself asserted the exact opposite was left unmentioned. Likewise, the legal errors in the instruction were no longer evidence of a reasonable likelihood that the jury applied the instruction in an objectionable manner, but, rather, "likely had no effect on its deliberations." (*Id.* at 83.)

Having reached these contrary conclusions, the state appellate court went on to discuss other of Smith's claims that it had not previously addressed. In perhaps its most baffling finding, the court concluded that Smith was not denied his ability to have countered the aiding-and-abetting theory with evidence because both sides had adduced evidence regarding his ability to have inflicted the fatal blow and because other evidence established his motive and involvement. (Pet. App. G at 84-85.)

Likewise, the state appellate court also found that Smith was not denied his ability to counter the aiding-and-abetting theory in his closing argument because he knew before that argument that the trial court was going to instruct on that theory. (Pet. App. G at 85.) The court was entirely unconcerned about the prosecution's not referencing the theory until its rebuttal argument because that reference was only "abbreviated" and "meager." (*Id.*)

Specifically with respect to the question of adequate notice, the court first noted the adequacy of the information that charged murder in compliance with

the governing statutes (*i.e.*, there was no requirement that the information specify every theory of liability). (Pet. App. G at 86.) It went on to find that, even if greater specificity were required with respect to the State's theory of liability, it was provided by evidence adduced at the preliminary hearing. (*Id.*) Specifically, a state investigator testified at that hearing that a jail informant had reported to police that Smith had made statements to him that "suggested" that Smith "may not have" personally committed the murder. (*Id.* at 86-87.)

Smith must quote in its entirety this hearsay testimony that the state appellate court found had "meaningfully apprised [him] of the potential for an aiding and abetting theory" (Pet. App. G at 87-88) as the quotation alone convincingly demonstrates that the Ninth Circuit did not err in finding objectively unreasonable the state appellate court's reliance on it as providing constitutionally adequate notice:

> Chris McShane, an investigator in this case, testified [during the preliminary examination] the police received information from David Moraga, a jail inmate who shared a cell with defendant during the latter's pretrial detention. McShane testified Moraga claimed defendant "had told him that he [defendant] had to get rid of his wife because she was standing in the way of his future plans; that she was threatening to divorce him and he wasn't going to give up half of his property he worked so hard for his entire life. [Defendant] [s]aid on the day of the murder

he had left the house earlier than he normally does, that [when] he left, he took the jewelry and the money out of the safe with him. He staged it to look like a home invasion robbery. He left a window open. He exited the house without setting the alarm. He went through the front door of the house, and that he went to work that day."

On cross-examination, McShane provided the following additional testimony: "Q. Did Mr. Moraga . . . tell you the manner in which the killing was carried out? [¶] A. He said that she was beat up real bad. [¶] Q. Did he give any further details? [¶] A. No. [¶] Q. Did he tell you who specifically did the killing? [¶] I notice you're pausing. . . . [¶] . . . [¶] Q. And [Moraga] really didn't have any information about who specifically did the homicide, did he? [¶] A. [Defendant] never told him specifically who did it, no. [¶] Q. And [Moraga] didn't really have any information, for example, about the wrist[s] being bound with wire, correct? [¶] A. Correct. [¶] Q. Or any anal tears, correct? [¶] A. Correct. [¶] Q. Or that she was bludgeoned with a type of fireplace implement? [¶] A. Correct. [¶] Q. He didn't know any of the details of the homicide itself and how it was carried out, correct? [¶] A. Correct. [¶] Q. Did he tell you that the homicide was committed before [defendant] left the house or was he vague on that point? [¶] A. He was vague. [¶] Q. In fact, he wasn't able to tell you whether this supposedly occurred in the morning, in the afternoon, or the evening, correct? [¶] A. Correct."

(Pet. App. G at 86-87.) No fair-minded jurist could conclude in an objectively reasonable manner that this exchange put Smith on notice, meaningfully or otherwise, of the possibility of the prosecution's pursuing an aider-and-abettor theory, *especially at a trial where the parties knew before opening statements that Moraga would not be called to testify*.

Turning next to the legal errors contained in the trial court's aiding-and-abetting instruction, the state appellate court rejected its earlier conclusion that these errors exacerbated the error of giving the instruction in the first place and precluded reliance on the presumption that jurors understand and faithfully apply instructions. Now, suddenly, the court found that it *could*, after all, rely on that presumption. (Pet. App. G at 90.) Now, in the court's view, the jurors understood that the errors were errors and simply ignored them, because they presumptively followed the trial court's *other* instruction that "[s]ome of these instructions may not apply at all." (*Id.*) Now, the injection by the trial court of a legal path to conviction for first-degree murder that eliminated the essential elements of malice aforethought, deliberation, and premeditation was merely a "technical" error. (*Id.*) The appellate court concluded that it was not reasonably likely that these errors influenced the jury. (*Id.* at 91.)

D. The District Court Decision

The district court accepted without revision (Pet. App. C) the Magistrate Judge's Report and Recommendation (Pet. App. D; hereinafter "R&R") and, accordingly, entered judgment granting habeas relief (Pet. App. B).

The R&R first accurately summarized the facts and procedural history of the case. (Pet. App. D at 31-41.) It found that the hearsay testimony at the preliminary examination relied upon by the state appellate court as having provided Smith constitutionally adequate notice "could plausibly" have provided sufficient notice (*id.* at 49), but it found that said testimony became irrelevant once it became clear that the informant was not going to testify at trial (*id.* at 51-55). The R&R took specific note of the salient facts that, first, the trial court prohibited the prosecution from referencing its informant in its opening statement (*id.* at 51-52); second, that the prosecutor expressly informed the court prior to the close of his case-in-chief that he would *not* be calling the informant in his case, and would only try to do so in his rebuttal case were Smith to testify (*id.* at 52); and third, that the prosecution presented no evidence that anyone other than Smith killed the victim or was involved in the crime (*id.*).

The R&R deferred to two factual findings of the state appellate court, namely:

> (1) the charging document and the informant's potential testimony as explained at the

> preliminary hearing served to give Petitioner notice of the aiding and-abetting theory before trial began; and (2) the prosecution presented no actual evidence (whether from the informant or any other source) to establish that [Smith] helped another person commit the homicide.

(Pet. App. D at 50.) It then found that Smith passed through the § 2254(d)(1) gateway. (*Id.* at 55.) It *also* found that the state appellate court made an unreasonable determination of fact, and that Smith thereby met his (d)(2) burden, because it took no account of the impact on Smith's reasonable expectations of the trial court's order, entered in the midst of the prosecution's opening statement, directing the parties not to mention the jailhouse informant. (*Id.* at 55-56.)

The R&R then found that the constitutional error was not harmless under the pertinent habeas standard because Smith was prevented from "offer[ing] evidence during the trial to refute the contention that he acted with another person to commit the crime . . . by the late assertion of the aiding-and-abetting theory," and because the evidence of guilt "was too close to have overriding confidence in the verdict." (Pet. App. D at 57-58.)

E. The Ninth Circuit Decision

Following the district court's acceptance of the R&R without revision upon its *de novo* review (Pet. App. C), the Ninth Circuit affirmed the grant of

habeas relief (Pet. App. A), albeit with somewhat different reasoning. Analyzing the state appellate court's decision under 28 U.S.C. § 2254(d)(2), it found two factual findings that had formed the basis of the state appellate court's decision objectively unreasonable. (Pet. App. A at 23-24.) First, it found that the state court materially misapprehended the record when it concluded "that Detective McShane's preliminary hearing testimony about statements Smith purportedly made to Moraga 'meaningfully apprised [Smith] of the potential for an aiding and abetting theory.'" (*Id.* at 23.) In doing so, it incorporated its earlier discussion of the issue, where it wrote:

> It is puzzling . . . how anyone could divine even a remote possibility of an aiding-and-abetting theory from the preliminary hearing transcript. Moraga's statements to Detective McShane suggested only that Smith had a motive to kill his wife and that he took several steps to make the house appear as if it had been burglarized. His statements did not indicate that Smith took these steps so that some other, unmentioned person could enter the house and commit the murder. Nor did defense counsel's cross-examination of Detective McShane raise the possibility that the prosecution would pursue an aiding-and-abetting theory. When defense counsel asked the detective whether Moraga knew any details about the murder – including the manner of the killing, who specifically did the killing, and when the killing occurred – she was seeking to impeach Moraga's credibility

> by showing that Moraga, after spending six months in a cell with Smith, knew very little about the crime that he claimed Smith confessed to committing. By impeaching Moraga, the defense did not acknowledge that the prosecution was pursuing an aiding and abetting theory. Indeed, it does not even appear that the defense's cross-examination gave the *prosecution* that idea – the prosecution's trial brief and motions in limine, filed nearly three months after the preliminary hearing, argued that Moraga's testimony served only to identify *Smith* as the perpetrator.

Id. at 21 (emphasis in original).

Second, the Ninth Circuit found the state court's factual finding that "[t]he prosecution's request for aiding and abetting liability instructions occurred during the parties' general discussion of the jury instructions and *not just prior* to closing argument" (emphasis added by Ninth Circuit) to be simply false. (Pet. App. A at 24.) As it accurately explained:

> [T]he prosecution requested, and the trial judge decided to issue, the aiding-and-abetting instruction on the morning of the day of closing arguments. . . . Defense counsel had only the lunch recess to formulate a response to the new theory.

(*Id.*)

The State does not contend that the state appellate court made a reasonable determination of either

of the facts with which the Ninth Circuit took such issue. It, rather, argues that they were simply immaterial because of the purported absence of the clearly established federal law required by § 2254(d)(1), or that they were not sufficiently unreasonable.

The court of appeals also determined that a violation of the Sixth Amendment's notice requirement occurred (Pet. App. A at 14-22) and that said violation was not harmless under the applicable habeas standard (*id.* at 22-23). It reached the former conclusion by relying on the language of the Sixth Amendment itself, "basic principles of due process," this Court's fair-notice cases, and its own precedent. (*Id.* at 14-22.) It reached the latter conclusion by applying the harmless-error standard of *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), and concluding that it had grave doubts about the reliability of the jury's verdict because of the evenly balanced record, which earlier had been recognized by both the state trial and appellate courts, and the fact that the prosecutor "invited the jury to speculate – at the last minute and without any evidence – about Smith's liability as an aider and abettor." (*Id.* at 22-23.)

REASONS FOR DENYING THE PETITION

I. THE QUESTION PRESENTED BY PETITIONER HAS LITTLE IF ANYTHING TO DO WITH THIS CASE

The Ninth Circuit decision at issue represents nothing other than a garden-variety, straightforward application of 28 U.S.C. § 2254(d)***(2)*** – the last-reasoned state-court decision made unreasonable determinations of fact by failing to consider key aspects of the record and by plainly misapprehending that record.

The greatest part of the State's argument is misplaced, arguing as it does that this Court needs to further school the Ninth Circuit as to how to properly apply 28 U.S.C. § 2254(d)(1) in a case decided on the basis of (d)(2). The State does finally get around to the case at hand at page 21 of its petition, where it addresses how the court of appeals "sought to justify its result." The State first asserts in a short paragraph that the findings of fact at issue are not really findings of fact at all and, consequently, *should have* been reviewed under (d)(1). (Pet. at 21.) With precious little explanation, it asserts that they are "more legal or mixed questions." (*Id.*) It is small wonder that the State has so little to say about this critical issue because the state-court findings are no such thing. Those findings – that preliminary-hearing testimony about statements Smith purportedly made to a jailhouse informant meaningfully apprised him of the potential for an aiding-and-abetting theory, and the prosecution's request for aiding-and-abetting

instructions did not occur just prior to closing argument (App. A at 23-24) – are materially indistinguishable from other findings routinely considered factual. *See, e.g.*, *Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (*per curiam*) (treating question of whether evidence required competency hearing as question of fact); *Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (treating state court's finding that records, purportedly relied on by defense counsel to limit their penalty-phase investigation, contained instances of sexual abuse when they did not, as question of fact); *Batchelor v. Cain*, 682 F.3d 400, 406-07 (5th Cir. 2012) (affirming grant of habeas relief based on *Faretta* violation and treating question of whether it reasonably appeared to trial court that defendant has abandoned his initial request to represent himself as question of fact); *Ben-Yisrayl v. Davis*, 431 F.3d 1043, 1049 (7th Cir. 2005) (affirming grant of habeas relief based on *Griffin* error and treating question of whether prosecutor's closing argument could reasonably be interpreted by the jury as an invitation to draw adverse inference from defendant's silence as question of fact); *Norton v. Spencer*, 351 F.3d 1, 7 (1st Cir. 2003) (affirming grant of relief based on *Brady* violation and treating question as to whether affidavits submitted in support of claim were cumulative as question of fact), *cert. denied*, 542 U.S. 933 (2004).

The State also claims, repeating its primary error, that the findings at issue were immaterial because "there is no 'clearly established' federal rule that proper notice in a charging document may be

superseded by inferences from the prosecutor's later conduct." (Pet. at 22.) Again, whether there is a clearly established federal rule is irrelevant to § 2254(d)(2) review, but, regardless, as shown in section III, *infra*, there is such a rule.

The final argument by the State is that the state appellate court findings were not shown to be false by clear and convincing evidence, as demanded by § 2254(e)(1). (Pet. at 22.) Leaving aside that this Court has not yet addressed the relationship between subsections (d)(2) and (e)(1) (*see Burt v. Titlow*, 134 S.Ct. 10, 15 (2013); *Wood v. Allen*, 558 U.S. 290, 293 (2010)), the findings at issue were false by *any* standard. The Ninth Circuit did not "merely substitute[ ] its own view of the facts . . . for the reasonable conclusions of the state court" (Pet. at 22), it substituted the *facts* for what were, most definitively, unreasonable conclusions. This is not a close question.

II. THE NINTH CIRCUIT CORRECTLY DECIDED THE CASE

That a state court made an unreasonable determination of the facts does not alone suffice to warrant habeas relief under § 2254(d)(2). "[H]abeas relief may be afforded to a state prisoner" only if his confinement also "violates federal law." *Wilson v. Corcoran*, 131 S.Ct. 13, 17 (2010) (*per curiam*) (citing § 2254(a)). That is a *different* question, however, than the § 2254(d)(1) question of whether a state court decision is contrary to or an unreasonable application of

"clearly established Federal law," which must be answered in light of the subsequent constructions of that phrase by this Court.

There is *no* question but that a violation of a defendant's right to notice of the nature and cause of the charges against him has been violated is a violation of the United States Constitution. The Sixth Amendment alone establishes as much – "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ." The State castigates the court of appeals for having the temerity to cite in its opinion its own habeas precedent after citing this Court's fair-notice cases upon which it relied. (Pet. at 8.) The State's claim that the Ninth Circuit's decision "is indistinguishable from *de novo* review on direct appeal" (Pet. at 13) completely ignores the § 2254(d)(2) review that took place. (Pet. App. A at 23-24.) As shown, *supra*, the state court's factual findings were such that no fairminded jurist could agree with them. Once the Ninth Circuit correctly so decided, it was entirely *proper* for it to apply *de novo* review. *See Panetti v. Quarterman*, 551 U.S. 930, 953 (2007); *Carlson v. Jess*, 526 F.3d 1018, 1024 (7th Cir. 2008).[3]

There is no greater reason to grant certiorari in this case than there was in *Cash v. Maxwell*, 132

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[3] Perhaps if the Ninth Circuit had placed its § 2254(d)(2) review *before* its constitutional analysis, the State might have grasped the point better.

S.Ct. 611 (2012), where this Court declined to grant the writ. In *Maxwell v. Roe*, 628 F.3d 486, 506 (9th Cir. 2010), the Ninth Circuit held that the state court had made an unreasonable determination of fact when it concluded that a jailhouse informant who had testified against the defendant did so truthfully. *Id.* at 504-05. Based thereon, the Court of Appeals reversed the district court's denial of habeas relief, finding that the defendant's conviction, premised on the informant's false testimony, violated his due process rights under the Fourteenth Amendment. *Id.* at 506. The circuit expressly relied on its own precedent to find constitutional error in such circumstances (*id.* at 506-07), that is, the very reliance that so offends the State herein (*see*, *e.g.*, Pet. at 16-17). Certiorari was denied (*see* 132 S.Ct. at 613), an apparent rejection of the contention that a habeas petitioner must establish a violation of clearly established federal law within the meaning of § 2254(d)(1) when a federal habeas court finds that a state court decision passes AEDPA review under (d)(2).

Finally, the State imagines a threat to "longstanding practices under [California] state law" by the Ninth Circuit's decision. (Pet. at 23.) The behavior of the prosecutor in this case, who had a history of misconduct, did not represent a "longstanding practice[ ]." Motivated by a well-founded fear that he had not succeeded in proving his theory that the entire case had been tried upon, namely, that Smith had bludgeoned the victim to death, he secured an aiding-and-abetting instruction that had no place in Smith's

trial. He then waited until his rebuttal closing argument, at a time when defense counsel obviously had no opportunity to respond, to drop his bombshell based thereon. It is the *duty* of federal courts to threaten such unethical gamesmanship.

III. EVEN WERE THE "QUESTION PRESENTED" BY THE STATE RELEVANT, IT SHOULD BE ANSWERED IN FAVOR OF RESPONDENT SMITH

As discussed, the court of appeals properly determined that Smith cleared AEDPA's statutory hurdle through its § 2254(d)(2) review, in which it explicitly engaged. (Pet. App. A at 23-24.) The court went on, however, to dispose of an argument that the State had raised at oral argument, namely, that § 2254(d)(1) precludes habeas relief because the state court decision was not contrary to nor an unreasonable application of *Griffin v. United States*, 502 U.S. 46 (1991), in which this Court held that due process does not require automatic reversal of a conviction merely because a jury is instructed on a factually unsupported theory as an alternative basis of liability. (Pet. App. A at 24-26.) The court rejected that argument, explaining that *Griffin* was not a Sixth Amendment notice case. (*Id.* at 25-26.) It also explained that it need not defer to the state court's prejudice determination because, under *Brecht*, it was required to apply a different standard. (*Id.* at 26.) It concluded that portion of its discussion by stating that, as a result of the different prejudice standards, it was "not constrained

by § 2254(d)(1) in deciding that the trial court's error in this case was not harmless," citing *Williams v. Taylor*, 529 U.S. 362, 406 (2000). (Pet. App. A at 26.)

On the cited page in the *Williams* decision, this Court explained that, should a state court decide an ineffective-assistance-of-counsel claim under a different prejudice standard than that required by this Court, "a federal court will be unconstrained by § 2254(d)(1) because the state-court decision falls within that provision's 'contrary to' clause."

The State has transmogrified the foregoing discussion into the *ratio decidendi* of the Ninth Circuit's decision, but it should be apparent that it is no such thing. The court was merely explaining why the State's (d)(1) argument was wrong. Its doing so did not alter in the slightest the plain fact that the court held that Smith surmounted AEDPA's statutory hurdle under (d)(2) because of the state court's unreasonable factfinding.

Assuming *arguendo*, despite those obvious facts, that the question presented by the State is a material one, and that it *does* matter whether this Court's Sixth Amendment fair-notice cases provided clearly established federal law under (d)(1) such as was contravened or unreasonably applied in this case, the State still should be denied certiorari. This Court's fair-notice cases would support a finding that (d)(1) is *also* satisfied herein.

"'[C]learly established Federal law' under § 2254(d)(1) *is the governing legal principle or*

principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (citations omitted, emphasis added); *see also id.* at 76 (affirming that AEDPA does not prohibit federal habeas courts from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case in which the principle was announced"). Simply put, "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (internal citations and quotation marks omitted); *see also id.* ("even a general standard may be applied in an unreasonable manner"); *Williams v. Taylor*, 529 U.S. 362, 407 (2000) (construing AEDPA to permit relief, where no case is directly on point, if "a state court either unreasonably extends a legal principle from [the Supreme Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply").

A good, recent illustration of the error in the State's demand for the irrelevant "spotted calf" is *Lafler v. Cooper*, 566 U.S. ___, 132 S.Ct. 1376 (2012). There, this Court held that the *Strickland* test for ineffective assistance of counsel, developed in the context of assessing the harm of an attorney's performance at trial, applies equally in the context of assessing an attorney's advice to reject a plea offer. It specifically defined prejudice in that context, in a

manner it had not previously done, as whether, "but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Id.* at 1385. This Court had no trouble finding that *Strickland* constituted clearly established federal law within the meaning of 28 U.S.C. § 2254(d)(1), despite the fact that it had never before been applied by the Court in the context of a defendant's rejection of a plea offer, let alone in a manner leading to a holding that constitutional error had occurred in such circumstances.

It was the view of only the *dissenting* Justices that the application of *Strickland* to the facts of this case constituted a "new rule of law" that could not "serve as a basis of habeas relief" because the Court had never before held that criminal defendants have a "constitutional right to effective plea-bargainers." *Id.* at 1392 (Scalia, J., dissenting); *see also id.* at 1396 (asserting that (d)(1) gateway not open because the Court had never before held "that a defendant in Cooper's position can establish *Strickland* prejudice").

In the instant case, the Ninth Circuit relied on three decisions of this Court articulating the governing legal principles regarding a defendant's

constitutional right to fair notice of the nature and cause of the accusations against him. (Pet. App. at 14.) Because those cases sufficiently set forth the governing legal principles, the State's efforts to distinguish them on their facts (Pet. at 15-16) accomplish nothing. This Court requires that a criminal defendant be given sufficient notice of the nature and cause of the accusations against him so that he can meaningfully defend himself against them. For all the reasons cited by the district court and court of appeals, that did not happen herein.

Moreover, the State's predicate claim that the constitutional right to sufficient notice dissipates upon the State's filing of a specific charge that provides such notice, is plainly wrong. The due-process requirement of adequate notice is and never was deemed eternally satisfied merely by statement of a legally adequate charge. *Lankford v. Idaho*, 500 U.S. 110 (1991), so demonstrates. There, this Court reversed a death sentence based on defense counsel's not having received adequate notice that the trial court was considering imposing the death penalty. Its holding "reflect[ed] the importance that we attach to the concept of fair notice as the bedrock of any constitutionally fair procedure." *Id.* at 121. *Lankford* is irreconcilable with the State's theory of notice. Lankford was charged with first-degree murder and he was expressly advised of this fact at his arraignment. That charge apprised Lankford of the possibility that he would face the death penalty.

After the jury found Lankford guilty and prior to sentencing, "the trial court entered an order requiring the State to notify the court and the state whether it would ask for the death penalty." 500 U.S. at 114. The state responded that it would not. *Id.* at 114-15. Then, following a sentencing hearing in which the propriety of a death penalty was not discussed by either party, the trial court imposed it.

In finding constitutionally inadequate notice that the death penalty could be imposed, this Court relied on the principle that controls regardless of whether the context is insufficient notice of a charge, a theory of prosecution, or a penalty, namely, "[n]otice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure." 500 U.S. at 126. Indeed, the Court cited several of its cases in noting that it has applied said principle in "a variety of contexts." *Id.* at 126 n.22.

This Court deemed irrelevant the facts that the charge itself carried the possibility of a death penalty and that the defendant had been expressly so advised at his arraignment because, *as a matter of fact in that case*, Lankford lacked meaningful notice that it would be pursued as the penalty against *him*. The Court *agreed* that the defendant had been given sufficient notice at his arraignment of the availability of the death penalty to the state and that the state's refusal to pursue it did not bind the trial court. It *nonetheless* reversed the denial of post-conviction relief based on constitutionally inadequate notice. In other words, precisely as herein, and directly contrary to the

State's argument that sufficient notice, once provided, cannot be abrogated, this Court found that the circumstances in *Lankford* did indeed abrogate what would otherwise have constituted adequate notice.

Significantly, this Court eschewed the categorical approach urged by the state – notice of the *possibility* of the state court's imposing a death penalty sufficed – in favor of a fact-based analysis of the reality of the case before it. Thus, for example, the Court expressly relied on the fact that the trial court's "silence following the [prosecution]'s response to the presentencing order *had the practical effect* of concealing from the parties the principal issue to be decided at the hearing." 500 U.S. at 126 (emphasis added). It further recognized that, *"[a]s a factual matter*, it is also undisputed that the character of the sentencing proceeding did not provide the state with any indication that the trial judge contemplated death as a possible sentence." *Id.* at 119 (emphasis added).

> During the [sentencing] hearing, while both defense counsel and the prosecutor were arguing the merits of concurrent or consecutive, and fixed or indeterminate, terms, the silent judge was the only person in the courtroom who knew that the real issue that they should have been debating was the choice between life or death. . . . [¶] *[I]t was surely reasonable for the defense to assume that there was no reason to present argument or evidence directed at the question whether*

> *the death penalty was either appropriate or permissible.*

Id. at 120 (emphasis added).

Further, and also apposite herein, the Court looked to defense counsel's actions to answer the question of the adequacy of notice:

> If defense counsel had been notified that the trial judge was contemplating a death sentence based on five specific aggravating circumstances, presumably she would have advanced arguments that addressed these circumstances; however, she did not make these arguments because they were entirely inappropriate in a discussion about the length of the state's possible incarceration.

500 U.S. at 122 (footnote omitted). The Court ultimately concluded that the inadequate notice created an "impermissible risk that the adversary process may have malfunctioned in this case" (*id.* at 127), and reversed. That selfsame risk existed herein, and this Court's precedent permitted the Ninth Circuit to remedy it, even were it to utilize § 2254(d)(1) to do so.

CONCLUSION

"The principal purpose of this Court's exercise of its certiorari jurisdiction is to clarify the law." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 902 (2009) (Scalia, J., dissenting). For the reasons stated, the State's disagreement with the Ninth Circuit's factbound conclusion in this unique case is an insufficient basis for granting certiorari.

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RECORD
AND
BRIEFS

No. 13-946

In the Supreme Court of the United States

RAUL LOPEZ, WARDEN, *Petitioner,*

v.

MARVIN VERNIS SMITH, *Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

Reply Brief for the Petitioner 1

Conclusion 10

TABLE OF AUTHORITIES

Page

CASES

Brown v. *Allen*
344 U.S. 443 (1953) 6
Cole v. *Arkansas*
333 U.S. 196 (1948) 2, 3
Cuyler v. *Sullivan*
446 U.S. 335 (1980) 6
Givens v. *Housewright*
786 F.2d 1378 (9th Cir. 1986) 2, 3
Harrington v. *Richter*
131 S. Ct. 770 (2011) 4
Hill v. *Lockhart*
474 U.S. 52 (1985) 4
In re Oliver
333 U.S. 257 (1948) 2, 3
Knowles v. *Mirzayance*
556 U.S. 111 (2009) 4
Lafler v. *Cooper*
132 S. Ct. 1376 (2012) 4
Maggio v. *Fulford*
462 U.S. 111 (1983) 6
Marshall v. *Rodgers*
133 S. Ct. 1446 (2013) 2
Miller v. *Fenton*
474 U.S. 104 (1985) 6
Morrison v. *Estelle*
981 F.2d 425 (9th Cir. 1992) 2
Murtishaw v. *Woodford*
255 F.3d 926 (9th Cir. 2001) 2

TABLE OF AUTHORITIES
(continued)

Page

Nevada v. *Jackson*
133 S. Ct. 1990 (2013) 2
Parker v. *Matthews*
132 S. Ct. 2148 (2012) 2
Patton v. *Yount*
467 U.S. 1025 (1984) 6
Rice v. *Collins*
546 U.S. 333 (2006) 8
Rushen v. *Spain*
464 U.S. 114 (1983) 6
Russell v. *United States*
369 U.S. 749 (1962) 2, 3
Sheppard v. *Rees*
909 F.2d 1234 (9th Cir. 1989) 2, 3
Strickland v. *Washington*
466 U.S. 668 (1984) 6
Thompson v. *Keohane*
516 U.S. 99 (1995) 6
Townsend v. *Sain*
372 U.S. 293 (1963) 6
Wainwright v. *Witt*
469 U.S. 412 (1985) 6
White v. *Woodall*
134 S. Ct. 1697 (2014) 1, 2, 4
Wood v. *Allen*
558 U.S. 290 (2010) 8
Yarborough v. *Alvarado*
541 U.S. 652 (2004) 4

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

28 U.S.C. § 2254(d) 2
28 U.S.C. § 2254(d)(1) 4, 5
28 U.S.C. § 2254(d)(2) 2, 5, 7
28 U.S.C. § 2254(e)(1) 8, 7
Antiterrorism and Effective Death Penalty Act ("AEDPA")
Pub. L. No. 104-132,
110 Stat. 1214 (1996) 1, 3, 5, 8

REPLY BRIEF FOR THE PETITIONER

As the petition explains (*e.g.*, Pet. 15-21), the court of appeals approached this matter by citing three of this Court's cases for the general proposition that a criminal defendant is entitled to fair notice of the charges against him (Pet. App. A at 14); citing only its *own* cases for the very different proposition that "a defendant who is charged with first-degree murder is entitled to notice of what specific theory of murder the prosecution intends to pursue" (*id.*); comparing the facts of this case to one of its own prior cases, in which it held that a prosecutor violated this "specific theory" notice right by requesting a jury instruction on a theory that the court concluded he had not sufficiently previewed during trial (*id.* at 16-20); and then pivoting back to conclude that respondent's "fundamental right to notice of the nature of the accusations against him was denied in violation of" *this Court's* cases (*id.* at 22; *see id.* at 20). For the reasons set out in the petition, that approach departs fundamentally from the framework for deferential federal habeas review of state court judgments established by Congress and this Court. *See also, e.g.*, *White* v. *Woodall*, 134 S. Ct. 1697, 1702 n.2 (2014) ("[A] lower court may not 'consul[t] its own precedents, rather than those of this Court, in assessing' a habeas claim governed by § 2254.").

Respondent's brief in opposition argues essentially that it does not matter whether the Ninth Circuit decided this case based on its own view of the *law*, because in the last step of its analysis the court reasoned that AEDPA does not bar relief where a state court judgment is based on an unreasonable determination of the *facts*. Under the circumstances here, however, that is no basis for avoiding review.

1. As discussed in the petition (at 16-18), the court of appeals improperly relied on its own precedents to conclude that respondent's state conviction was based on federal constitutional error. Pet. App. A at 14-15. This Court has repeatedly made clear that that is error. *See, e.g.*, *Woodall*, 134 S. Ct. at 1702 n.2; *Nevada* v. *Jackson*, 133 S. Ct. 1990, 1994 (2013) (*per curiam*); *Marshall* v. *Rodgers*, 133 S. Ct. 1446, 1450-51 (2013) (*per curiam*); *Parker* v. *Matthews*, 132 S. Ct. 2148, 2155 (2012) (*per curiam*).

Respondent argues (Opp. 28) that the Ninth Circuit properly relied on its own prior decisions as part of a *de novo* review conducted only after the federal court had concluded under Section 2254(d)(2) that the state court's judgment was based on factual findings with which no reasonable jurist could have agreed. But that is not what the Ninth Circuit did. Rather, after reciting the deferential standard of review established by Section 2254(d), the court cited three decisions of this Court that stand only for the general proposition that a criminal defendant has the right "to be informed of the nature and cause of the accusations against him so that he may have a meaningful opportunity to prepare an adequate defense." Pet. App. A at 14, citing *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948); *In re Oliver*, 333 U.S. 257, 273 (1948); and *Russell* v. *United States*, 369 U.S. 749, 766-68 (1962). The court then turned to its own precedents for the very different proposition that a defendant charged with first-degree murder is entitled to notice of the prosecution's specific theory of how the defendant committed the crime. *Id.* at 14-15, citing *Murtishaw* v. *Woodford*, 255 F.3d 926, 953-54 (9th Cir. 2001); *Morrison* v. *Estelle*, 981 F.2d 425, 428 (9th Cir. 1992); *Sheppard* v. *Rees*, 909 F.2d 1234, 1235 (9th Cir. 1989); and *Givens* v. *Housewright*, 786

F.2d 1378, 1380-81 (9th Cir. 1986). Applying only those precedents, the court held even more specifically that this right to notice of a particular theory of prosecution could be violated where the prosecution, in the court's view, led the defense to understand that it was proceeding on one theory but then, at the close of the evidence, requested a jury instruction on an additional theory. *Id.* at 16-17. And it then held that respondent's rights had been violated because, in that regard, this case was "indistinguishable from [the Ninth Circuit's prior decision in] *Sheppard*."

The court of appeals never purported to conclude that respondent's case was indistinguishable from any decision of *this Court*. Its reasoning was that its own decision in *Sheppard* "faithfully applied the principles enunciated" by this Court's general notice cases (Pet. App. A at 17); that this case was like *Sheppard* (*id.* at 17-20); and that, therefore, "Smith's constitutional right to notice under [*this* Court's decisions in] *Cole*, *Oliver*, and *Russell*, was violated" (*id.* at 20). And that reasoning *preceded*, in the court's opinion, any consideration of whether the state court's decision rested on some purportedly wholly unreasonable finding of fact. *See id.* at 23.

That approach to federal habeas review cannot be reconciled with the limitations imposed by AEDPA and repeatedly recognized and enforced by this Court. Although respondent suggests that this Court's cases may clearly establish the law even if it is necessary to apply them in a new factual context (*see* Opp. 31-32), the Court has repeatedly made clear that where the Court has not squarely addressed an issue, there is no controlling precedent for purposes of AEDPA.

A "specific" legal rule may not be inferred from this Court's decisions; rather, the Court must have "squarely" established the rule. *Harrington* v. *Richter*, 131 S. Ct. 770, 786 (2011); *Knowles* v. *Mirzayance*, 556 U.S. 111 (2009). By its very terms, "Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." *Woodall*, 134 S. Ct. at 1706 (original emphasis). Indeed, "AEDPA's carefully constructed framework 'would be undermined if,'" as respondent suggests, "'habeas courts introduced rules not clearly established under the guise of extensions to existing law.'" *Id.* (quoting *Yarborough* v. *Alvarado*, 541 U.S. 652, 666 (2004)). Instead, under Section 2254(d)(1)'s stringent review standard, a federal habeas court may set aside a state conviction based on an alleged constitutional error only where "it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement'" as to the issue. *Id.* (quoting *Richter*, 131 S. Ct. at 786-87).

Respondent cites *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012), as an example of this Court extending clearly-established precedent to a new context—the general prejudice test for ineffective assistance of counsel at trial to the effectiveness of counsel during the plea-bargaining process. Opp. at 32-34. But this Court explained in *Lafler* that its ruling was based on its prior precedents, including *Hill* v. *Lockhart*, 474 U.S. 52 (1985), that had already established that the constitutional right to effective assistance of counsel extends to the pretrial plea process. Here, there is no prior holding of this Court establishing either that a defendant is constitutionally entitled to notice of the prosecution's specific theory of guilt, or

that constitutionally adequate notice provided by a charging document may later be vitiated by inferences drawn by the defense (or a later reviewing court) from the prosecutor's conduct before or during trial. Those are propositions critical to the court of appeals' decision here, but the court drew them only from its own precedents. There was accordingly no basis for the federal court here to conclude that the state court judgment in respondent's case was contrary to "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

2. That legal error cannot be sidestepped by characterizing the court of appeals' application of AEDPA as turning instead on two "factual findings": that preliminary hearing testimony concerning a possible informant witness "meaningfully apprised" respondent of the possibility of an aiding-and-abetting theory, and that the prosecutor's request for an aiding-and-abetting instruction after the close of the evidence came far enough in advance of closing arguments so that defense counsel had adequate time to prepare a response (or seek a continuance for that purpose). *See* Pet. App. A at 23-24.

First, as the petition explains (at 22), those "findings" are relevant only if one first accepts the court of appeals' erroneous approach to ascertaining the applicable law. Relying on them to justify the federal court's conducting a *de novo* legal analysis, rather than deferential review under AEDPA, is entirely circular.

Second, and in any event, the putative "findings" are not findings of historical fact of the sort addressed by AEDPA, 28 U.S.C. § 2254(d)(2). This Court has long explained that "issues of fact" are "basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of

their narrators ....'" *Thompson* v. *Keohane*, 516 U.S. 99, 109-110 (1995) (quoting *Townsend* v. *Sain*, 372 U.S. 293 (1963), quoting *Brown* v. *Allen*, 344 U.S. 443, 506 (1953) (opinion of Frankfurter, J.)). In contrast, "mixed questions" of fact and law require the application of a legal standard to the facts, and therefore are not issues of basic, primary, or historical fact. *Id.* at 110 (citing *Townsend*, 372 U.S. at 309, n.6). In some instances, this Court has extended the meaning of "factual issues" beyond the basic determination of "what happened." *Id.* at 111 (citing *Maggio* v. *Fulford*, 462 U.S. 111, 117 (1983) (competency to stand trial); *Wainwright* v. *Witt*, 469 U.S. 412, 429 (1985) (trial court's determination of juror bias in excluding juror for cause); *Patton* v. *Yount*, 467 U.S. 1025, 1036 (1984) (same); *Rushen* v. *Spain*, 464 U.S. 114, 120 (1983) (same). But those cases involve issues whose "resolution depends heavily on the trial court's appraisal of witness credibility and demeanor," an appraisal the trial court is best positioned to make. *Thompson*, 516 U.S. at 111. Where a determination involves the application of a legal standard to historical facts, the Court has instead treated the issue as one of law. *Thompson*, 516 U.S. at 116 (whether defendant in custody at the time of confession); *Id.* at 111-112 (citing *Miller* v. *Fenton*, 474 U.S. 104, 116 (1985) (whether confession voluntary); *Strickland* v. *Washington*, 466 U.S. 668, 698 (1984) (whether counsel provided effective assistance); *Cuyler* v. *Sullivan*, 446 U.S. 335, 341-342 (1980) (whether attorney's representation of multiple defendants gives rise to conflict of interest)).

The state-court conclusions cited by the federal court of appeals here are not matters of historical fact. In reaching those conclusions, the state court assessed, for example, whether a particular event

gave the defendant "meaningful" notice, and whether his time to respond to a purportedly surprising request for a jury instruction on an alternative theory of guilt was adequate under the circumstances of the case. At a minimum these conclusions involve mixed questions of fact and law, focusing on the legal implications of a situation whose factual details are not disputed. They were not findings of fact that a federal court could properly deem "unreasonable" for purposes of Section 2254(d)(2).

And finally, even if the two propositions identified by respondent and the court of appeals were findings of historical fact, the panel had no proper basis for rejecting them under Sections 2254(d)(2) and (e)(1). Indeed, the court of appeals never truly even analyzed the "factual findings" for objective unreasonableness. It simply substituted its own judgment that, despite the preliminary hearing testimony—suggesting that respondent had a motive to kill his wife and took steps to stage the house as a burglary scene—it would not have concluded that he took these steps so that an accomplice could complete the murder. Pet. App. A at 21. Likewise, rather than showing how the state court's interpretation of the record—that the defense had adequate opportunity to prepare a response as the prosecutor asked for the aiding-and-abetting instruction at the jury instruction conference and not just prior to closing argument as there was a lunch break in between—constituted an error so obvious and indisputable that reasonable minds could not even disagree, the court of appeals merely asserted that the timing of the prosecutor's request did not afford the defense adequate time to respond. Pet. App. A at 24. But "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in

the first instance." *Wood* v. *Allen*, 558 U.S. 290, 301 (2010). Even if reasonable minds could disagree about the finding, that does not suffice to overturn the state court's determination. *Rice* v. *Collins*, 546 U.S. 333, 341-342 (2006). Here, the state court's conclusions were presumptively correct; they were not objectively unreasonable; and respondent never showed them to be false by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Nothing about them was, or was clearly shown to be, so plainly unreasonable as to warrant setting aside a state court judgment.

3. Finally, the court of appeals' departure from the proper bounds of AEDPA review warrants correction by this Court in this case. In characterizing the decision below as "unique" and "heavily fact-bound" (Opp. 5), respondent never comes to grips with the potential impact of the Ninth Circuit's published decision in light of the law and standard charging practices in California (and likely other States), which have never required the prosecution to specify any particular theory of culpability at the outset of a criminal case. If permitted to stand, the court of appeals' opinion will subject criminal convictions in California and other States to attack, both on direct appeal and in federal habeas proceedings, on the premise that, in the view of the Ninth Circuit, it has long been "clearly established" as a matter of federal constitutional law that a murder defendant is entitled to notice of the government's specific theory of prosecution -- and that in some circumstances it may properly be inferred, based on how a particular case develops, that the government has become constitutionally barred from pursuing theories of liability that it has not articulated and preserved to the satisfaction of the defendant and a reviewing court. While each set

of specific facts in which that argument is invoked may well be "unique," the whole premise for the argument in each such case will be the same important error of law.

It is certainly true that, as respondent notes, "this Court has *already* provided guidance, through multiple decisions, on how federal habeas courts should 'apply the deferential standard of review required by 28 U.S.C. § 2254(d).'" Opp. 5 (original emphasis). As the petition notes (at 24-25), however, the Court has nonetheless repeatedly found it necessary to intervene when courts of appeals have plainly failed to abide by the restrictions that Congress has imposed on federal courts setting aside state convictions. The Court's intervention is again warranted in this case, in which the Ninth Circuit relied on its own precedents to vacate a state murder conviction on the basis of a putative constitutional rule that this Court has never adopted and that could have very broad effects.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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